93-451

SUPREME COURT, U.S.
AUG 30 1993
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HAROL WHITLEY, et al.,

Petitioner,

v.

WARREN ROBERT STANDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETTITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a habeas petitioner may predicate actual prejudice and therefore habeas relief on a trial error which was undeniably invited by a considered defense strategy, and if so, whether that error may be deemed harmless despite overwhelming evidence of guilt.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

LIST OF ALL PARTIES.....iin

INDEX TO APPENDIX.....iii

TABLE OF AUTHORITIES.....iv

PETITION

OPINIONS AND JUDGMENTS BELOW.....2

JURISDICTIONAL STATEMENT.....3

CONSTITUTIONAL PROVISIONS.....4

STATEMENT OF THE CASE.....4

SUMMARY OF ARGUMENT.....15

REASONS FOR GRANTING THE WRIT.....17

1. The decision below, allowing Standen to benefit from an error

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LIST OF ALL PARTIES

Harold Whitley and Brian McKay, who was Attorney General of the State of Nevada when Standen commenced his habeas proceedings in the district court, and were the parties to the proceeding in the court whose judgment is sought to be reviewed. Frankie Sue DelPapa is now Attorney General of the State of Nevada.

he invited is inconsistent with decisions of state and federal courts on the same issue.....17

2. The decision below decided an important question of constitutional law respecting the nature, scope and application of harmless error analysis in federal habeas appeals which has not been but should be decided by the court.....19

CONCLUSION.....30

INDEX TO APPENDIX

A. Ninth Circuit Opinion.....A1-A48

B. Magistrate's Report.....B1-B36

C. District Court Order.....C1-C2

D. Order Dismissing Appeal.....D1-D10

E. Findings and Conclusions.....E1-E9

F. Opinion of Nevada Supreme Court.....F1-F12

TABLE OF AUTHORITIES

Page

CASES

Brecht v. Abramson,
61 U.S.L.W. 4335 (No. 91-7358,
April 21, 1993).....16, 20, 22

Harrington v. California,
395 U.S. 250 (1969).....22

Johnson v. United States,
318 U.S. 189, 199-200 (1943).....17

McKinney v. Rees,
993 F.2d 1378, 1386 (9th Cir. 1993)...22

Standen v. State,
101 Nev. 725, 710 P.2d
718 (1985).....3

Standen v. Whitley,
____ F.2d ____ (9th Cir. 1993).....2

Strickland v. Washington,
466 U.S. 668 (1984).....18

United States v. Garrett,
727 F.2d 1003, 1012
(11th Cir., 1984).....17

United States v. Page,
661 F.2d 1080, 1082-3
(5th Cir. 1981).....18

United States v. Pina,
844 F.2d 1 (1st Cir., 1988).....18

CONSTITUTIONS, RULES

28 U.S.C. Sections 1254(1).....4

28 U.S.C. Section 1331, 2241, 2254.....3

28 U.S.C. Section 2253, 1291.....3

Sup.Ct.R. 20.....3

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, HAROL WHITLEY, Warden of the Nevada State Prison, Petitioner herein, by and through his counsel, and files this Petition for a Writ of

Certiorari seeking reversal of the Opinion of the Ninth Circuit Court of Appeals.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit filed on June 4, 1993, is reproduced in Appendix A. Standen v. Whitley, _____ F.2d _____ (9th Cir. 1993). The magistrate's report and recommendation denying Standen's petition for habeas corpus filed on June 7, 1990, is reproduced in Appendix B. The federal district court's order adopting the magistrate's recommendation is reproduced in Appendix C. The Nevada Supreme Court's unpublished order dismissing Standen's appeal from the denial of post-conviction relief filed on August 25, 1988, is reproduced in Exhibit D. The Order of the Second Judicial District Court for the State of Nevada, County of Washoe, denying Standen's state petition for post-

conviction relief filed on May 10, 1988, is reproduced as Exhibit E. On direct appeal from the state court convictions, Nevada Supreme Court published opinion of December 11, 1985, affirming Standen's conviction, Standen v. State, 101 Nev. 725, 710 P.2d 718 (1985), is reproduced in Appendix F.

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a habeas corpus petition in September, 1990. See 28 U.S.C. Section 1331, 2241, 2254. Standen appealed the lower court's denial of habeas corpus relief. 28 U.S.C. Section 2253, 1291.

The Circuit Court of Appeal for the Ninth Circuit reversed the lower court order on June 4, 1993. This petition for a writ of certiorari was filed within 90 days of the judgment of the court of appeals below. Sup.Ct.R. 20. The

jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

1. The due process clause of the Fourteenth Amendment to the United States Constitution.

2. The assistance of counsel clause of the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Standen was charged with the January 31, 1978, murder of Kaylyn Danner. The prosecution maintained that Standen abducted Danner from her place of employment, the Monte Carlo Casino in Reno, Nevada, and then drove Danner's car to a remote place in Sparks, Nevada, where he raped and murdered her. Danner's body was found the next morning by a dirt road, partially dressed; the contents of her purse were dumped on the ground next to the body.

Danner's car was found several hours later at a local truck stop. No one saw who had driven and parked the car. The truck stop is three miles from the crime scene.

Inside the car was Danner's purse, a pair of panties and pantyhose. The dome light was broken and the interior had been spattered with blood; the hood also had been spattered with blood. Fingerprints were also present, but were of insufficient quality to allow for comparisons.

On February 4, three days after the murder, the police found a trucker's log book bearing the name Warren Standen. The log book was less than a half mile from Danner's body. Three fingerprints were found on the log book, but again were of insufficient quality for comparison.

It is undisputed that a semen specimen was retrieved from Danner's

autopsy and Standen could have been the donor. It is undisputed that pubic hair and head hair were found at the scene and in Danner's car and these specimens were consistent with specimens provided by Standen. It is also undisputed that Standen was present at the Monte Carlo shortly before Danner was abducted. At that time, Standen was also carrying an item which could have been his log book. It is further undisputed that within 30 minutes of the abduction, Standen was present at the truck stop at which Danner's car was found. At that time, however, Standen did not have the log book and was not wearing the heavy coat he had been seen in at the casino; he did not appear to have been in a struggle, however.

When Standen arrived at the truck stop, he called for a cab. The cabbie departed with Standen at 12:29 a.m. on

February 1, 1978. Standen asked to be taken to a bus depot. Before driving far, however, Standen asked the driver to turn back, because Standen had forgotten something, namely, the log book. Standen asked various truck stop employees about the log book, but was reminded that when he arrived he did not have it.

Several hours later, Standen and another person checked into a motel in Reno. Standen used the name Larry Mattson, rather than his true name. Standen had been staying at a Holiday Inn next door to the Monte Carlo.

The real Larry Mattson was a businessman from Oregon, who also happened to be in Reno on January 31, 1978. Mattson had lost his wallet which included identification cards and credit cards.

Standen used Mattson's credit card several times in the ensuing months. On the day his log book was found, for

example, Standen purchased two bus tickets to Las Vegas and left Reno.

Meanwhile, the police secured an arrest warrant for Standen. He was apprehended in New York in July, 1978. When arrested, Standen still possessed Mattson's identification and credit card. He also had a buck knife which a forensic pathologist suggested could have been the murder weapon.

In September, 1978, Standen was extradited to Nevada. During the journey, Standen invoked his rights, but made unsolicited comments to the transporting detectives. While the detectives did not inform Standen of any of the evidence they uncovered, Standen said he would make an "ass" of the district attorney, because they only had his log book; Standen said he did not have the log book in January-February, but knew who did - Standen did not name that person, preferring not to be

a "snitch."

Standen went on to say that if the police found who had used Larry Mattson's credit card, they will have found the killer. Handwriting analysis revealed, however, that Standen had forged many of the Mattson documents.

Standen also said he would reveal the name of the killer after Standen himself was convicted. In February, 1978, Standen entered his guilty plea to the charge. Later, he invited the police to the Nevada State Prison for a chat. During the conversation, Standen gave the police a number of demonstrable lies.

He also told the police that, when he arrived in Reno, he met Paul Santmyer, Larry Mattson, and "Ron" who were also carnival workers. Standen's information was contradicted, particularly as to Mattson and Santmyer.

Finally, Standen said he had never

been to Sierra Sid's Truck Stop. Unfortunately, four people contradicted this account.

Later, Standen asked to have his plea withdrawn. The trial court denied the request, but the Nevada Supreme Court reversed. Accordingly, Standen went to trial in July of 1984.

At trial, Standen maintained that he lacked the intellectual acumen to pull off a murder requiring military precision. To support his defense, Standen argued that Santmyer was the killer, and told his attorneys he watched Santmyer commit the crime. Accordingly, Standen claimed that the prosecution unfairly zeroed in on him, they carelessly discarded potentially exculpatory evidence and dropped reasonable leads. The latter was a constant theme of defense cross-examination of the State's experts.

Knowing that the quality of the

evidence had dissipated or had been destroyed by the lab after Standen pled, it became a considered trial strategy to discredit the forensic experts and their science. The experts could not explain their apparent incompetence, however, because a defense motion in limine precluded reference to Standen's guilty plea.

After at least four warnings by the trial judge, and repeated objections by the prosecutor, defense counsel opened the subject of lab incompetency one more time, and this time the trial judge allowed the witnesses to answer so as to explain why investigative activity ceased and why some evidence was discarded. This necessitated mentioning the history of the case, including the plea.

As a result, the trial judge made this observation:

> Ladies and gentlemen, what we are talking about now is the

> procedural history of this case, and you would not have heard about it had the defense not opened the door.
>
> And if the State wants to go into the history it may do so.

Immediately following the trial judge's comment, this exchange occurred:

> Q. Why wasn't the evidence frozen in this case back in 1979?
>
> A. Because after we'd started analyzing in 1979, 1979, the evidence was resubmitted after Mr. Standen was brought back [from New York]. We were prepared to do the testing, but Mr. Standen pled guilty to the charges. Therefore, after a pleading of guilty, our standard policy is not to maintain the material frozen.

Once the plea and its withdrawal was in evidence, Standen used it extensively to show his lack of a mentality to commit these crimes. He also used it to bolster the claim someone else had to have committed the crimes - Santmyer.

Unfortunately, the State found Santmyer and called him as a witness in

rebuttal. Santmyer proceeded to devastate Standen's defense. Standen's attorneys called Santmyer's testimony the telling blow to the defense.

After the close of evidence, the trial judge gave two instructions respecting Standen's plea. The instructions read as follows:

> The defendant previously pled guilty in this case. The Nevada Supreme Court set aside his plea of guilty on the ground that the plea was involuntary because he did not understand the nature of the charge against him.
>
> You may not find the defendant guilty in this case solely on the ground that he previously pled guilty. You may find the defendant guilty only upon consideration of all the evidence in the case.

The jury convicted Standen. The Nevada Supreme Court affirmed ruling that the trial judge's instruction was erroneous, but the error was harmless beyond a reasonable doubt owing to overwhelming evidence of guilt. Appendix

F.

Later, Standen petitioned the state court for post-conviction relief, citing ineffective assistance of counsel. Specifically, counsel was ineffective in broaching the issue of the guilty plea. After an evidentiary hearing, the trial judge disagreed. The Nevada Supreme Court affirmed, concluding that counsel's questioning necessitated the introduction of Standen's plea and that Standen failed to prove prejudice in light of the overwhelming evidence of guilt. Appendix D.

Standen then sought a writ of habeas corpus in Federal District Court under 28 U.S.C. Section 2254. The District Court rejected Standen's claim and adopted the magistrate's recommendation to deny habeas relief. Accordingly, owing to the overwhelming strength of the state's evidence of guilt, Standen's

ineffectiveness claim failed for lack of prejudice, and his due process claim predicated on the erroneous jury instructions was found to be harmless beyond a reasonable doubt. Appendix B.

The Ninth Circuit reversed. It concluded that the introduction and the trial judge's instructions respecting the guilty plea was a "trial error" which had a substantial injurious effect or influence in determining the jury's verdict.

SUMMARY OF ARGUMENT

Four courts have reviewed the record in this case. Each has concluded that error occurred, but it was invited by the defense. Three of the four courts have concluded that the error was harmless, because Standen's conviction rests on overwhelming evidence of guilt. Only the Ninth Circuit has found the evidence wanting.

In reaching this decision, the Ninth Circuit concluded that a violation of Nevada's Evidence Code, which precludes admission of evidence of a previously entered and later withdrawn guilty plea, is one of constitutional dimension, and held, under Brecht v. Abrahamson, 61 U.S.L.W. 4335 (No. 91-7358, April 21, 1993), it was a "trial error" which had a substantial and injurious effect on the jury.

Petitioner respectfully submits that the Circuit Court's decision is in conflict with the highest court of the State of Nevada on the same issue, and in conflict with other circuits respecting invited error.

Finally, owing to the importance of the harmless error rule in criminal cases, particularly in the context of federal habeas appeals, the Circuit Court has decided an important issue of federal law

which has not been, but should be settled by this Court, and has done so in a way that conflicts with applicable decisions of this Court. Accordingly, petitioner respectfully requests that certorari be granted.

REASONS FOR GRANTING THE WRIT

There are two reasons for granting the writ. We will consider them in turn.

* * *

1. THE DECISION BELOW, ALLOWING STANDEN TO BENEFIT FROM AN ERROR HE INVITED IS INCONSISTENT WITH DECISIONS OF STATE AND FEDERAL COURTS ON THE SAME ISSUE.

The Ninth Circuit expressly conceded that the error here was invited, but the court concluded, whether invited or not, the error entitled Standen to a new trial. Criminal defendants cannot complain on appeal of an alleged error invited or induced by them, however. Accord, Johnson v. United States, 318 U.S. 189, 199-200 (1943); See also United States v. Garrett,

727 F.2d 1003, 1012 (11th Cir., 1984); United States v. Page, 661 F.2d 1080, 1082-3 (5th Cir. 1981); United States v. Pina, 844 F.2d 1 (1st Cir., 1988).

Here, Standen created error, and eight years later is rewarded for it. Petitioner respectfully submits that certorari be granted.

Similarly, if the error is, as here, the effect of a strategic decision then the accused is not entitled to relief unless he pleads and proves that counsel's performance was both deficient and prejudiced him, thus denying him effective assistance of counsel as guaranteed by the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 (1984).

Standen cited ineffective assistance in both his state and federal habeas attacks. The claim was rejected each time, and findings and conclusions were filed. Appendix B, D. E. The Ninth

Circuit never disputed these findings, conclusions or rulings. Accordingly, criminal defendants can invite error and, at the same time, receive effective assistance and still, years later, receive habeas relief from the Ninth Circuit.

2. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW RESPECTING THE NATURE, SCOPE AND APPLICATION OF HARMLESS ERROR ANALYSIS IN FEDERAL HABEAS APPEALS WHICH HAS NOT BEEN BUT SHOULD BE DECIDED BY THE COURT.

In Brecht, this Court announced the standard for harmless error analysis in federal habeas appeals. The test is whether the error "had a substantial and injurious effect or influence in determining the jury's verdict. Accordingly, under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in "actual prejudice."

The lower court reversed because it

concluded that the "invited error" was a "trial error" under Brecht, and then held this error not harmless.

Unlike this Court in Brecht, the Ninth Circuit did not read the record as a whole and it claimed the State's evidence lacked overwhelming force. It ignored findings and conclusions from the lower courts and gave remarkable, if not unprecedented, deference to defense theories which were either not offered, or are repelled by the record. The Ninth Circuit's ruling is therefore an unnecessary and unwarranted extension of Brecht in an area of constitutional law of immense importance.

In Brecht, this Court held the inquiry is whether, in light of the record as a whole, the trial error had the requisite effect or influence in determining the jury's verdict. Indeed, the Ninth Circuit adopted a per se

approach to the issue, and reached the predictable conclusion. Below, the court said that a fair trial "cannot" be had if a jury must weigh with all the evidence "the one overwhelming piece of evidence: the defendant pleaded guilty." The weight of the guilty plea, the court said, was heavier than all the other pieces of the prosecution's circumstantial case, and its admission must have affected the minds of the jurors.

Three courts have reviewed this record, the same record presumably reviewed below, and concluded, under the applicable standards of review, that the error was harmless owing to the overwhelming evidence of guilt. The Ninth Circuit simply substituted its own analysis. This conclusion is underscored by the Circuit Court's unnecessary criticism of the Nevada Supreme Court for applying the wrong standard of review.

While the Nevada court referred to the substantial evidence standard, and the Ninth Circuit was quick to point out the court's reliance on that standard, it plucked this quotation out of context. Rather, the Nevada court applied the appropriate standard and made this comment:

> We agree the instruction given by the trial judge was erroneous and a misstatement of the law. However, since the evidence of guilt was overwhelming, we conclude that the error was harmless beyond a reasonable doubt. See Harrington v. California, 395 U.S. 250 (1969).

Although the Ninth Circuit charitably noted the State had a case without mentioning Standen's plea, the State made a persuasive showing of overwhelming evidence of guilt. Brecht was upheld on a showing of "weighty" evidence, and the Ninth Circuit, before Standen's case, agreed "weighty" evidence is the watermark. See McKinney v. Rees, 993 F.2d

1378, 1386 (9th Cir. 1993).

More than "weighty" evidence was required in Standen's case as the list of facts conceded by the Ninth Circuit attests:

> 1. Standen was present near the place and at the time the victim was abducted.
>
> 2. Standen was at the truck stop where the victim's car was found at a time close to when the murder occurred.
>
> 3. Standen was at the truck stop for no apparent reason, called a taxi to drive him back to the city he had just left.
>
> 4. Standen was seen earlier the night of the murder wearing a heavy coat, but discarded it on a winter night.
>
> 5. Standen's log book was found a short distance from the decedent's body.
>
> 6. Standen's blood type was consistent with the semen found in the victim's vagina.
>
> 7. Standen's head and pubic hair were consistent with those found on the victim's clothes and in her car.
>
> 8. Standen denied being at the truck stop.

9. Standen claimed "an old acquaintance" as being in his company after the murder.

10. Standen had enough time to abduct and kill the decedent and dispose of his bloody clothes.

The evidence conceded by the Ninth Circuit alone is weighty, yet the court failed to note other telling evidence. Consider the following:

1. Standen had the log book with him when he was at the location from which the victim was abducted.

2. Standen hired a cab to take him to a bus depot.

3. Standen actually left town the day his log book was found.

4. Standen's denial of being at the truck stop was a demonstrable lie.

5. That after the murder, Standen never returned to the Holiday Hotel when he was a registered guest there and the Holiday Hotel is next door to the victim's place of employment.

6. That after the murder, Standen assumed the identity of Larry Mattson and, since Standen was unemployed for some time, lived on Mattson's credit card.

7. That Standen was alone at the Monte Carlo and at the truck stop.

Given the evidence conceded below and that overlooked by the Court, petitioner submits the evidence of guilt was certainly weighty, if not overwhelming.

The telling blow was not the revelation of Standen's plea, but the fact that his prime candidate for murder, Paul Santmyer, appeared in court with an airtight alibi for the crimes and was proven not to have signed any of Mattson's credit card receipts. Also telling was Standen's demonstrable lie that he was not at the truck stop the night of the murder.

Accordingly, given the overwhelming force of the State's evidence, in light of the record as a whole, the introduction of Warren Standen's plea could not have had both a substantial and injurious effect on the jury.

Despite the evidence recited above,

the appellate court refers to, and treats with remarkable deference, three circumstances which necessitate retrial. The lower court's evaluation of these factors is tethered to the court's belief that Standen was a hapless drifter who was in fact set up.

The appellate court's assumption is, of course, flawed because we are not dealing with an unidentified nefarious actor who presumably set up Standen. Standen named Paul Santmyer. Moreover, hapless drifters do not fly in from Chicago, and stay in comfortable accommodations, like the Holiday Inn.

Motive. While it is undisputed that Standen had no job, no money and no means of support and was also interested in contacting women, but not at a brothel, the appellate court concluded that Standen had no motive, and was thus set up. A reasonable juror, however, could easily

consider Standen's circumstances, and totally reject a set up, because pubic hairs similar to Standen's were found on Danner's undergarments, and a semen specimen which could have been donated by Standen was also present. Given that Standen did not have a motive, it would take a strained adaptation of the record to conclude that he was set up when such intimate pieces of evidence are present at the scene and could unlikely be planted.

The log book. Similarly, the appellate court thinks the log book was planted. Surely, planting a log book at least a half mile from the crime scene, out of plain view, in a ditch, a place it took a cadre of people three days to find and not on a road as the Court of Appeals seemed to believe, is a most unlikely place to plant evidence, if not a ridiculous way to frame someone. Since the other "set up" evidence was at the

scene, why was the key piece of evidence dealt with so carelessly. If the real killer could put pubic and head hairs at the scene, certainly s/he could have left the log book there too. And frankly there was no reason not to.

Likewise, the appellate court's supposition that Standen turned over his log book to another who would return it to him later at the truck stop is equally dubious. First, the assumption is unsupported by the record. There was no evidence presented that Standen was meeting someone at the truck stop, nor was there evidence that he gave his log book to anyone. Not even Standen's own story to the police supports the Court of Appeals' claim.

Finally, while the log book did not appear scuffed or bloody, the appellate court assumed that it should have been in that condition if Standen were involved in

a death struggle with the victim. Again, no evidence, at least from this record, supports the conclusion that the log book was scuffable, or was held in such a way that blood would get on it.

Failure to flee. Because Standen did not immediately leave town after the killing, did not attempt to hide his identity and then later came looking for the log book, the appellate court found no consciousness of guilt. The appellate court forgets, however, that when Standen first hired the cab at the truck stop, he asked to be taken to a bus depot. Seconds later, Standen asks to return to the truck stop, and according to the cabbie, Standen sounded nervous and excited but appeared calm when he said he forgot something and had to return. Likewise, if Standen had no consciousness of guilt, he would have returned to the Holiday Inn where he was registered, but never did; he would not

have checked into another motel under an assumed name, nor would he finger an obviously innocent man for the crime. Likewise, if Standen had no consciousness of guilt why should he leave town the day the log book is actually found, again using an assumed name which he continued to use for another six months.

CONCLUSION

For the reasons stated above, petitioner asks that a writ of certorari to the United States Court of Appeals for the Ninth Circuit issue and that the decision of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WARREN ROBERT STANDEN,
Petitioner-Appellant,

v.

HAROL WHITLEY, et al.,
Respondents-Appellees.

No.91-16422

D.C. No.
CV-86-00303-ECR

OPINION

_____/

Appeal from the United States
District Court for the
District of Nevada
Edward C. Reed, Jr.,
District Judge Presiding

Argued and Submitted
March 8, 1993--
San Francisco, California

Filed June 4, 1993

Before: Alfred T. Goodwin,
John T. Noonan, Jr. and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Noonan;
Concurrence by Judge T.G. Nelson

SUMMARY

Criminal Law and Procedure/
Habeas Corpus/Due Process

The court of appeals reversed an order of the district court. The appellate court held that admission of a legally withdrawn plea of guilty as trial evidence deprived the defendant of due process and had a substantial and injurious effect in determining the verdict of the jury.

Appellant Warrant Standen was an itinerant carnival worker who was arrested for a kidnapping and stabbing murder after the logbook he kept in connection with that work was found in the vicinity where the victim's body had been found. Other evidence may have tied Standen to the crime. For example, the semen in the victim's vagina was from a male of blood type A, which Standen was. Pubic hairs found in her underclothes were consistent with Standen's specimens, and hairs from the back seat of her car were consistent

with those from Standen's head. Standen's IQ was 65, his education had stopped at the sixth grade, he was illiterate, and he had been a mental patient.

When apprehended, Standen denied guilt and stated that he knew who was responsible, although he did not identify anyone. Standen was arraigned on an open murder charge, which did not specify the elements of the crime or denominate it by degree, and he pleaded not guilty. The state declared its intention to seek the death penalty. As a result of negotiations, Standen changed his plea to guilty and was sentenced to life without parole. His application for post-conviction relief was granted by the Supreme Court of Nevada on the basis that his plea was not knowing or understanding. The court noted that an open murder charge did not charge or mention murder in the first degree.

Standen was tried for murder with the use of a deadly weapon, and the jury eventually found him guilty of using a deadly weapon in the victim's stabbing death. Prior to trial, his motion in limine to exclude evidence of his withdrawn guilty plea was granted. However, at trial his counsel pursued a line of questioning to which the obvious response was evidence of Standen's prior plea, which the court ultimately admitted, and on which the prosecutor commented in closing argument. The court twice instructed the jury that it could not convict Standen on the evidence of his prior plea alone, but did not exclude it altogether.

The state supreme court affirmed, holding that the evidence was erroneous, but that the verdict was supported by substantial evidence. The district court denied Standen's petition for habeas

corpus relief.

[1] A fair trial cannot be had if the jury must weigh with all the other evidence the defendant's guilty plea, the one overwhelming piece of evidence. [2] That defense counsel's tactics may have invited the error did not mitigate it. Counsel's strategy could not be a waiver of Standen's right to a fair trial.

[3] The plea was not a legal conviction after the state's courts had permitted its withdrawal, but the admission of all elements of the crime remained. Standen could not have had a fair trial with his withdrawn plea as evidence. [4] The error was not structural, that is, one that denied Standen an impartial tribunal, competent counsel, or a public trial. However, it effectively destroyed the trial itself, undermining its structure to the extent that the trial bacame [sic] an empty shell. [5] The error was similar

to the erroneous admission of other types of evidence and was therefore susceptible to the harmless error analysis. [6] Habeas relief could be granted only if the error had substantial and injurious effect or influence in determining the jury's verdict. Even so, the verdict could not be salvaged. The weight of the plea, as against the other circumstantial evidence, must have affected the minds of the jurors. [7] The jury's verdict indicated that it concluded that the evidence established that Standen was the killer, eliminating the possibility that he was convicted of felony-murder in connection with the victim's kidnapping.

[8] Other evidence indicated that Standen had no motive, that he had no apparent fear of identification or arrest, and that he was a stranger in town who was simpleminded enough to have been set up by others. [9] A thorough review of the

record indicated convincingly that evidence of the guilty plea had substantial and injurious effect or influence in determining the verdict.

Judge T.G. Nelson, concurring, noted that Standen had been denied a jury that could fairly weigh all the evidence, and that the Supreme Court of Nevada had used its opportunity for review to weigh the sufficiency of the evidence rather than the fairness of Standen's trial.

COUNSEL

John C. Lambrose, Assistant Federal Public Defender, Las Vegas, Nevada, for the petitioner-appellant.
Kevin G. Higgins, Assistant Attorney General, Carson City, Nevada for the respondents-appellees.

OPINION

NOONAN, Circuit Judge:

Convicted of murder in the first degree and sentenced to life imprisonment without the possibility of parole, Warren Robert Standen seeks a writ of habeas

corpus. At his trial his original plea of guilty, which he had lawfully withdrawn, was introduced by the prosecution, and the jury was instructed by the court that the plea could be considered as evidence against Standen. We hold that this instruction deprived Standen of due process of law and had a substantial and injurious effect in determining the verdict of the jury. We therefore order that the writ issue.

FACTS

The evidence presented by the prosecution showed the following:

Kaylyn Danner liven in Reno, Nevada, in a trailer with her three children, ages 14, 11 and 10. She had been separated from her husband for four months. On the evening of January 31, 1978, her husband came to see her at the trailer. He left about 10:00 p.m.

Kaylyn Danner visited her friend

Jeannie Sweet at approximately 11:00 p.m. She was due to begin the night shift at midnight at the Monte Carlo Casino on Sixth Street, Reno, about a seven minute drive from Sweet's residence. She left Jeannie Sweet for the casino at approximately 11:40 p.m. No witness saw her alive again.

Kaylyn Danner's body was found the next day, February 1. It lay on a turnoff from a dirt road in Sparks, Nevada, 5.7 miles east of the Monte Carlo Casino. The area at this date was not built up. The area was unlighted at night.

Kaylyn Danner had been stabbed in the back with a knife fifteen times; stabbed six times in the chest; deeply scratched on the face; and cut on her hands. Her throat had been slit. The hour of death could not be ascertained.

The body was partly clothed. Semen, not older than 48 hours, was in her

vagina, but the medical examiner did not detect trauma to her genitals and was unable to say that she had been raped. Her lifeless fingers clutched her office key. Near the body were her boots, papers apparently dumped from her purse, and the broken cover of the domelight of a car, later determined to be hers. A .22 caliber handgun she carried in the glove compartment, her credit card, and a little cash disappeared and were never found.

On the night of the murder a householder at a distance observed the tail lights of two cars pull into the turnoff on January 31 -- one at about 6:00 p.m., one at about 10:30 p.m. The tail lights were out. He saw no more.

Two to three miles from where the body was found was Sierra Sid's 76 Truck Stop. The yellow Camaro Kaylyn Danner had been driving was found in the zone reserved for trucks at Sierra Sid's. The

car's domelight had been broken. Blood had splattered the interior, a windowscraper, one window, and the hood. Kaylyn Danner's purse, pants, pantyhose, and panties were in the back seat.

Three days later, on February 4, a search with Explorer Scouts, high school students used as police auxiliaries, found a trucker's logbook 5 to 7 feet off a dirt road. The logbook was discovered either 998 feet or 3500 feet from where the body had been found (different distances being supplied by the same witness). The book, a green notebook with snaps, contained the name of an employer, City of Fun Carnivals, and a trucker working for City of Fun, Warren Standen. The entries in the logbook ended in November, 1977, except for the telephone number of the Eldorado Motel, Reno, and the name "Larry, Larry, Larry." The book had only three, indecipherable fingerprints.

Standen was an itinerant carnival worker, originally from Rome, New York. He had an IQ of 65. He had worked for City of fun Carnivals as a laborer, ride operator, and driver in October-November, 1977; his logbook reflected his trips for this enterprise. On January 24, 1978, he flew from Chicago to Reno and checked into the Holiday Inn on Sixth Street. He checked out at 1:32 p.m., January 31, 1978.

The Holiday Inn is adjacent to the Monte Carlo Casino. The manager on duty the evening of the 31st was familiar with Standen because he had sought refunds on American Express travellers' checks. She noticed him, apparently waiting for someone, in the lobby of the Holiday Inn between 11:20 p.m. and 11:40 p.m. He was wearing an overcoat or raincoat and was carrying an object that may have been his logbook.

Standen was next observed at Sierra Sid's in Sparks. The time was approximately 12:20 a.m., February 1. He used a telephone at Sierra Sid's to call a cab. He looked well-groomed, not like a man who just had been in a fight. According to Betty Johnson, the casino manager at Sierra Sid's, "He was clean and attractive-looking, like he was going out on a date or something." The cabdriver, Kevin Ryan, entered Sierra Sid's to pick him up. Standen got into the cab and sat in the front seat, making no effort to avoid being seen. He looked neat and composed. Ryan recognized him as a passenger he had had before and whom he had telephoned at the Holiday Inn in an effort by Ryan to arrange a 24-mile roundtrip to the Mustang Ranch, a legal brothel. According to Ryan's first statement to the police, Standen was not wearing a coat nor carrying any objects;

at trial he remembered nothing about Standen's clothes until his first statement was read back to him.

Three minutes into the ride Standen asked ryan to return to the truck stop. According to Ryan's first statement to the police, Standen said he had forgotten that he was supposed to meet someone at the truck stop. According to Ryan's trial testimony, Standen said he had forgotten that he was supposed to meet someone at the truck stop. According to Ryan's trial testimony, Standen said he had forgotten something. Standen reentered Sierra Sid's and asked if anyone had seen a logbook, then went to look for it in the restaurant. He did not ask the cab to wait. His subsequent movements that night are not known but eventually on February 1 he checked into another Reno motel, the B-J.

A warrant was issued for Standen's

arrest for murder. On July 19, 1978, he was apprehended in a jail in Monroe County, New York, under the alias of Larry Mattson. In the course of the journey back to Nevada for trial, Standen told the deputies that he had not committed the crime; that they had only his logbook ("now I know where it went to"); that he would make an ass out of the district attorney; that he knew who had committed the murder and would not be a snitch yet he would reveal the name after his own conviction; and that if they found the man who used Larry Mattson's credit card, they would "find the guy you're looking for." Standen had the credit card on his person along with other papers identifying him as Larry Mattson.

Larry Mattson was a businessman from Klamath, Oregon, who had been in Reno on January 31, 1978. He testified that his wallet, his credit card, driver's license,

and pilot's license "came up missing" on this date. He believed the loss must have occurred after noon on the 31st as he had used the card to check into the Eldorado Motel. He checked out on February 1st, apparently not using the card again. He reported the credit card loss to the credit card company on February 7th and to the police on February 13.

The credit card had been used since its disappearance. On February 1 it was used to check two men (one later determined to be Standen) into the B-J Motel. On February 4 it was used to buy two bus tickets from Reno to Las Vegas. It was then used in Las Vegas to check two men into the Hotel Nevada; Standen was one of them. The next day the card was used to rent a car. The signature of Larry Mattson was forged on all these credit slips b a hand that could not be identified.

The trail of forged slips led to Bellingham, Washington, where Standen made a half-hearted attempt to sell the rented car. Thereafter the card was used and the Mattson signature forged by Standen. On February 17, 1979, the car was abandoned in Florida. When Standen was apprehended in New York he still had the Mattson card and papers.

The semen found in Kaylyn Danner's vagina indicated the donor was a Type A secretor. Standen has Type A blood as does 32 percent of the male population of the United States. Pubic hairs found in Danner's undergarments were consistent with specimens provided by Standen. Hairs found in the back seat of the Camaro were consistent with hairs from his head.

PROCEEDINGS

On September 24, 1978, a complaint charging "open murder" was read to Standen. An open murder charge does not

apprise the accused of the elements of the crime nor that it is murder in the first degree. An information charging the same offense was read to him on November 2, 1978, and he pleaded not guilty. In January 1979, the state filed notice of its intention to seek the death penalty. Negotiations for a plea ensued. On February 13, 1979, Standen changed his plea to guilty. He was sentenced to life without the possibility of parole.

At his own request Standen was then interviewed at the Nevada State Prison and gave some account of his activities near the time of the murder. He denied being at Sierra Sid's the early morning of February 1, 1978. He said that when he left the Holiday Inn on January 31 he put his belongings in the car of a man named Paul Santmeyer and moved to the B-J Motel across from the bus depot in Reno where he shared lodgings with Santmeyer, Larry

Mattson, and perhaps one other. He said he stayed there two weeks with Larry Mattson although Santmeyer left shortly after the move. When the deputies pointed out that the motel records showed he had only stayed at the motel one or two nights, he then said that they had stayed in Santmeyer's car. He said that the person responsible for the murder was "Ron." He said Ron had showed him a .22 handgun.

Subsequently Standen sought post-conviction relief, alleging that he had not entered the plea knowingly or understandingly. The same judge who had taken his guilty plea heard this petition and denied it. On appeal, the Supreme Court of Nevada reversed, stating: "It is very clear that Standen's plea was not entered knowingly or understandingly." Standen v. State, 657 P.2d 1159, 1161 (Nev. 1983). In passing, the court noted

that Standen was "an illiterate former mental patient" with a sixth grade education and that the open murder charge did not charge or even mention murder in the first degree. Id. at 1160 nn.1-2.

Under an amended information Standen was charged with murder with the use of a deadly weapon. On October 18, 1983, he pleaded not guilty. Prior to trial, he moved in limine to exclude evidence of the prior guilty plea. The motion was granted. Trial began July, 1984. During the trial his counsel tried to show that the police had acted improperly by prematurely disposing of evidence and not following up leads as to other possible perpetrators. The obvious response to this line of questioning, that Standen had pleaded guilty, was impossible under the court's ruling. After unheeded warnings to defense counsel not to pursue this kind of questioning the trial court admitted

evidence of Standen's plea.

Defendant's counsel immediately asked the court to instruct the jury that the plea could not be considered as evidence. The Court responded to this request by stating:

> Ladies and Gentlemen, the instruction will be at the close of the trial that you cannot decide this case on the basis of the guilty plea alone.
>
> In other words, you can't say he pled guilty previously, he must be guilty, therefore we're going to find him guilty. You must decide the case on the basis of all the evidence that is presented here in the court. You must consider it all and then decide the case. And you must be convinced, of course, beyond a reasonable doubt.
>
> MR. SEXTON (defense counsel): Your Honor, are you saying then that they can consider this for any purpose at all?
>
> THE COURT: They can consider all the evidence in the case and that happens to be part of the evidence. But they cannot decide that he is guilty on that basis alone.

The defense objected to this instruction.

The defense then called as a witness Fred Atcheson, who had worked on the case in the Public Defender's Office in 1979. On cross-examination, the prosecution asked the following questions and received the following answers:

> Q: You are familiar with what a guilty plea is, aren't you?
>
> A: Yes.
>
> Q: And that is the admission of the facts?
>
> A: It's both a waiver of all defects prior to the entry of a plea and it's also the admission as to the essential elements of an indictment or information against a defendant.

The cross examination went on to bring out that before pleading guilty his counsel had gone over the elements of his case with Standen.

In proposing instructions for the jury at the end of the trial, the defense again asked for an instruction excluding the plea and objected to the instruction

the court actually gave. The court told the jury:

> You may not find the defendant guilty in this case solely on the ground that he previously pled guilty. You may find the defendant guilty only upon consideration of all the evidence in the case.

The jury was also instructed that any "statement" that the defendant did not make voluntarily must be disregarded. The jury was also told, in a separate instruction, that the Nevada Supreme Court had set aside Standen's plea of guilty "on the ground that the plea was involuntary because he did not understand the nature of the charge against him."

In his closing argument to the jury the prosecutor asked, "What does the guilty plea tell us?" and answered his own question in the person of the defendant: "'I was aware of the facts'; his attorney was aware of the facts; they discussed it all."

The prosecution's evidence included the facts we have already stated. In addition, Standen's voluntary statement at the Nevada State Prison was introduced, and the state presented Paul Santmeyer as a witness to refute Standen's account of his presence in Reno. Santmeyer testified that he had never been in Nevada before and that he knew Standen only as a fellow inmate of a state school for the retarded in Rome, New York.

Standen was found guilty of first degree murder in violation of Nev.Rev.Stat. Section 200.030 and of committing a murder with the use of a deadly weapon, enhancing his punishment under id. 193.165 to a term equal to the term of imprisonment described by the statute for the crime. On August 15, 1984, he was sentenced to two consecutive sentences of life without the possibility of parole.

In a per curiam opinion the Supreme Court of Nevada affirmed. Standen v. State, 710 P.2d 718 (Nev. 1985). The court noted that the trial court's instruction on the use of the guilty plea as part of the evidence was erroneous: "A prior guilty plea that has legally been withdrawn or judicially invalidated is deemed never to have existed and should not be used as evidence." Id. at 720. The court very briefly reviewed the evidence against Standen and concluded: "Where there is substantial evidence in the record to support the jury verdict, this Court will not disturb the verdict on appeal." Id.

Standen filed a petition for post-conviction relief. It was heard by the same judge who had taken his original guilty plea and who then presided at his trial. The petition was denied. On appeal to the Nevada Supreme Court,

Standen represented himself. His appeal was dismissed without opinion, Standen v. State, 809 P.2d (Nev. 1988).

Standen filed an amended petition for habeas corpus in the federal district court on December 9, 1988. The court denied Standen's request for appointed counsel. On June 7, 1990, a magistrate judge filed a report and recommendation denying the petition. The report and recommendation were adopted by order of the district court in September, 1990.

Standen appealed. On December 27, 1991, this court granted Standen a certificate of probable cause. On May 29, 1992, it appointed counsel to represent Standen.

ANALYSIS

[1] A comprehensive search has discovered no case on all fours with this one -- no case where a court told a jury that a withdrawn guilty plea was part of

the evidence against the defendant. If no such case exists, it is because it contradicts the character of a trial to ask a jury to consider a defendant's guilt in terms of specific testimony and also in terms of his own plea of guilty. A plea of guilty is no "mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." Kercheval v. United States, 274 U.S. 220, 223 (1927). A fair trial cannot be had if the jury must weigh with all the other evidence, pro and con, the one overwhelming piece of evidence: the defendant pleaded guilty.

[2] That the tactics of Standen's counsel had provoked the trial court into allowing the plea in evidence, that the court's error can thus be catalogued as invited, does not mitigate what was done. The defendant is bound by his counsel's strategic decisions. United

States v. Martinez, 883 F.2d 750, 755 (9th Cir. 1989), **vacated on other grounds** 928 F.2d 1470 (9th Cir. 1991). But counsel's strategy cannot be held to have acted as a waiver of Standen's right to a fair trial by jury, **cf.**, Carnley v. Cochran, 369 U.S. 506, 516 (1962); and the state does not contend that it does.

[3] Legally, the plea no longer had the effect of a conviction after the Nevada Supreme Court had permitted its withdrawal. The admission of every element of the crime remained, with damning force when the jury was told it could consider the plea as part of the case before it. Standen could not have had a fair trial when his withdrawn plea constituted evidence against him.

If the jury put together the instruction that it not consider statements of Standen involuntarily made and the instruction that the Nevada

Supreme Court had found his guilty plea to be involuntary, the jury would not have considered the guilty plea at all. But the jury had twice been told by the trial court that the guilty plea was evidence before it. When the trial court gave contradictory instructions, the jury cannot be presumed to have chosen the correct one. United States v. Panter, 688 F.2d 268, 270 (5th Cir. 1982).

[4] The Supreme Court of the United States has distinguished two kinds of constitutional error in a trial: structural, destructive of such basic elements as an impartial tribunal, public trial, and competent counsel, and those "trial errors" impacting constitutional rights without destroying the trial's structure. Arizona v. Fulminante, 111 S.Ct. 1246, 1264-65 (1991); Chapman v. California, 386 U.S. 18, 23 n.8 (1967). It is difficult to classify the

constitutional error here in terms of these alternatives. The error did not deny Standen an impartial judge and jury, competent counsel, or a public trial. But the error made the presentation of a defense a vain exercise. The error "either aborted the basic trial process, or denied it altogether." Rose v. Clark, 478 U.S. 570, 578 n.6 (1986) (citations omitted). The error effectively destroyed the trial itself. The structure of the trial was undermined as the trial itself became an empty shell.

[5] Considered as a structural error, the admission of, and instructions on, the guilty plea cannot be neutralized by harmless error analysis. Chapman, 386 U.S. at 23. However, structural error may be the wrong classification. See Fulminante, 111 S.Ct. at 1265. Rather, this type of error is more properly characterized as a "trial-type error" --

an "error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless." Id. at 1264. The improper admission of a guilty plea, like the admission of a coerced confession, is "similar in both degree and kind to the erroneous admission of other types of evidence" and is therefore amenable to harmless-error analysis. Id. at 1265.

[6] Consequently, we apply the test, which is more stringent for the petitioner, appropriate in collateral review of trial error. Brecht v. Abrahamson, 61 U.S.L.W. 4335, 4340 (April 21, 1993). This test is the test originally announced in Kotteakos v. United States, 328 U.S. 750, 776 (1946). Under this standard habeas relief must be

granted only if the trial error "'had substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, [61] U.S.L.W. at 4336 (quoting Kotteakos, 328 U.S. at 776). Even on this scale, the verdict in this case cannot be salvaged. The weight of the guilty plea was heavier than all the other pieces of the prosecution's circumstantial case; its admission must have affected the minds of the jurors, short-circuited the process of rational deliberation and been harmful in the sense that it produced the guilty verdict.

The Nevada Supreme Court considered the case as though it were an appeal in which the sufficiency of the evidence for conviction were challenged. The court looked to what evidence supported the conviction apart from the guilty plea erroneously admitted. There is no basis in our law for such a review of

constitutional error committed by a state trial court. "There is a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment." Roger Traynor, The Riddle of Harmless Error, 27 (1970). Review for harmless error "requires the most painstaking examination of the record and the most perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact." Id. at 30. This duty of a meticulous review of the record becomes particularly significant in application of the Kotteakos standard. Brecht, 61 U.S.L.W. at 4341-42 (Stevens, J., concurring).

No doubt the prosecution had a case without the intrusion of the plea. Standen was present at the Holiday Inn,

near where Kaylyn Danner was probably abducted, and present at 11:40 p.m., near the probable time of the abduction. Standen was present at Sierra Sid's, not far from where her body was found, and present at 12:20 p.m., a time arguably close to the time the murder occurred, although in fact there is no evidence as to the hour of death of Kaylyn Danner. Standen went from the casino to the truck stop for no apparent reason and then called a taxi to take him back to the city he had just left. Standen apparently discarded his coat on a winter's night between the time he was seen in Reno and the time he was seen in Sparks. Standen lost his logbook, he thought at Sierra Sid's, and it was found not far from where Kaylyn Danner's body was found. Her car was parked at Sierra Sid's. He denied being at Sierra Sid's. He said he knew who the murderer was, and he alluded to an

old acquaintance as being in his company in the days after the murder. His blood type was consistent with the semen found in Kaylyn Danner's vagina, and his hairs were consistent with those found on her clothes.

The defense argued that Standen did not have time to commit the crime. If Kaylyn Danner entered the parking lot at the Monte Carlo Casino at 11:47 p.m. and was immediately abducted, Standen had approximately 33 minutes to do the deed -- that is, on the assumption that Standen was the murderer, he had 33 minutes to commit the murder between the time of abduction and his appearance at Sierra Sid's at 12:20 a.m. The driving time, calculated by a police officer driving at the speed limit, was 12 minutes from the casino to where the body was found, 5 minutes from there to Sierra Sid's. That left 16 minutes for the abduction, the

fight with the victim, the knifing, and disposing of his coat and any other bloody garments (none of which were ever found) -- a short time but arguably enough.

This evidence did not prove that Standen inflicted the fatal blows unless it is assumed that he acted alone. The state conceded that it could "not exclude" the possibility that another was involved. The assumption that Standen was alone was not supported by the evidence and indeed appears contrary to such clues as the speed with which the abduction was carried out; the use of a local backroad turnoff by a person who would not have known the local roads; Standen's looking for someone else at Sierra Sid's; his rapid and effective disposal of a presumably bloodstained overcoat; his close association with another person in leaving Reno in the days immediately following the murder, the person with whom

he shared the use of Larry Mattson's credit card; and Standen's own claim that another man was the one they were looking for.

That Standen said, after he was arrested for murder, that the wanted man was the one who had signed Mattson's credit card, and that after his own guilty plea Standen supplied the name of "Ron," does not confirm Standen's guilt. He had spent much of his life in institutions of the state and knew the harsh rule governing informers, so, as he told the police, he would not be a snitch. Caught by conflicting compulsions from his past, he dredged up one name (Santmeyer) he thought innocuous and gave it, and he gave the name of the murderer "Ron" without enough information to identify him. His lie caused Paul Santmeyer trouble but it did not identify the man who may have participated in the kidnapping and murder.

It is possible that the state might have proved Standen guilty of felony-murder. The state did not prove rape. The state explicitly disavowed seeking to prove homicide in the course of robbery. But the state did produce enough evidence to make the conclusion irresistible that Kaylyn Danner was kidnapped. Death was inflicted in the course of the kidnapping. If Standen was involved in the kidnapping, he could be proved guilty of felony-murder. Payne v. State, 406 P.2d 922 (Nev. 1965). Felony-murder is first degree murder under Nev. Rev. Stat. 200.030. The jury was instructed on the elements of felony murder.

The indictment of Standen, however, did not charge felony murder, but read as follows:

> MURDER WITH THE USE OF A DEADLY WEAPON, a violation of NRS 200.010, NRS 200.030, and NRS 193.165, a felony, in the manner following:

> That the defendant in the late evening hours of the 31st day of January A.D. 1978, and the early morning hours of the 1st day of February A.D. 1978, or thereabout, and before the filing of the Amended Information, at and within the County of Washoe, State of Nevada, did willfully, unlawfully, and with malice aforethought, deliberation, and premeditation, kill and murder KAYLYN DANNER, a human being, in the following manner, to wit: That the defendant did abduct, kidnap, sexual assault, batter, and stab the said KAYLYN DANNER in Washoe County, Nevada, which stabbing with the use of a deadly weapon caused the death of KAYLYN DANNER during the same period of time.

The charged crime was the actual killing of Kaylyn Danner.

[7] The jury found Standen guilty of using a deadly weapon in the stabbing of Kaylyn Danner -- a conclusion that indicates beyond doubt that the jury supposed that the evidence before it established that Standen was the killer. The verdict excludes the possibility that Standen was convicted of felony murder. While the evidence apart from his

withdrawn plea might have shown him guilty of felony murder, the convergent circumstances pointed to by the prosecution did not show beyond a reasonable doubt that Standen was the killer, unless they were substantially helped by the plea of guilty.

Without the guilty plea there were several substantial problems with the state's case.

First, Standen's absence of motive. No certain evidence of rape was produced. Rather, there is the suggestion of a set-up -- the victim's pants, pantyhose, panties removed and put in the back of the car, the boots that must have come off first left near the body; sexual assault intimated.

If rape was not Standen's motive, robbery is also eliminated. He already had access to Mattson's credit card -- credit enough to live on. He could not

use Danner's and her card disappeared from her purse never to be used again. She was a woman struggling to make a living, no person to rob. The state did not even charge robbery.

If not to rape or rob, why kidnap and kill? That there were those who might have had motive to do so was hinted at by the defense; it was not the defense's job to convict some other suspect. Although a vicious psychopath may need no rational motive, the failure to show a motive weakens the state's case. And the extraordinary violence with which Kaylyn Danner's life was ended points to a murderer absolutely intent on assuring her death, a person apparently different from the hapless, motiveless drifter, Warren Standen. Such a conclusion, if far from certain, is one that a jury that had not been substantially affected by Standen's withdrawn guilty plea might have reached.

Second, that the logbook was lost by Standen, not planted by perpetrators who set him up. That a man bent on kidnapping should carry his logbook with him, having already stored somewhere else his other gear, seems unlikely; that the logbook containing business entries from a much earlier date should have been needed by him that night is curious; that Kaylyn Danner could have opened a car window and thrown it out or that she would have possessed it after she had been dragged bleeding from the car seems improbable; that the logbook should turn up, unbloodied and unscuffed, on a road that good police work would be likely to search is surprising; that Standen would be looking for the logbook at Sierra Sid's suggests that he had turned it over to another who said it would be left for him there or that he, the possessor of the logbook, would meet Standen there; that

Standen had reason to believe he would be met there is suggested by his failure to keep the cab he had ordered; that the book had no readable fingerprints suggests that whoever placed it wanted Standen's name to appear but nothing that would connect it with its last possessor. The police treated the logbook as a heaven-sent clue. But a jury uninfluenced by the guilty plea could well have suspected that the clue was placed there by a less than heavenly agency.

Third, Standen's failure to flee. Standen remained in Reno for three days after the murder. He did so sharing the benefits of a stolen credit card. He then embarked on an expedition that left a paper trail. A man guilty of murder must have been afraid of staying in the city of the murder and been afraid of being tracked in the days following the murder.

Standen's failure to flee converges

with his conduct at the time when, according to the state, he had just finished completing a brutal, bloody murder. That there had been a real fight by Kaylyn Danner was undeniable -- the blood within the car, on the window, on the windowscraper showed that she had been knifed inside the auto; the key clutched in her hand was a defensive weapon; the abrasions on her hands showed, in the medical examiner's opinion, that she had sought to ward off the blows; that the car's domelight's cover had been broken off indicated that in resisting she was able to move to some degree; there was blood on the hood showing that she continued to bleed after being dragged from the car. It is scarcely credible that the man who killed her had no blood on his clothes. It is barely possible that the man who had just killed her would strike two witnesses as neat, well-

groomed, composed only a few minutes after the struggle. It is hardly believable that the assailant in such a bloody business would not try to conceal his face from a cabdriver or that he would inquire boldly in a small truck stop about a document tied to him. Standen's conduct does not show consciousness of guilt of a capital crime. Or so at least a jury not injuriously and substantially contaminated by the guilty plea in evidence might have concluded.

[8] A defendant without proven motive; a defendant whose conduct on the night of, and the days following, the murder showed no fear of identification or arrest; a defendant, stranger to the town, simpleminded enough to have been set up by those who may have had a deep interest in Kaylyn Danner's death -- could a jury find the evidence convincing beyond a reasonable doubt without the powerful

assistance of the plea?

[9] After a thorough review of the record we are convinced that the use of the guilty plea as evidence had substantial and injurious effect or influence in determining the jury's verdict.

REVERSED. The district court is ordered to issue the writ sixty days from the issuance of the mandate, unless within that time the State of Nevada indicates to the district court its intention to re-try Standen. In that event, the district court shall order Standen released to the proper authorities for the purposes of re-trial.

T.G. NELSON, Circuit Judge, Concurring:

I concur in Judge Noonan's analysis and in most of his opinion. I write separately only on two matters.

First, my reading of the cold record left me with an abiding belief in Warren

Standen's guilt. The facts which led me to this conclusion are set out in Judge Noonan's opinion, and need not be marshaled here again. However, the jury is the body whose conclusion matters, and its verdict was tainted by a trial error unique in the history of the common law. Regardless of my view of his guilt, Standen was entitled to a trial at which the jury could fairly weigh all the evidence, a function denied to it by admission of evidence that Standen had previously pleaded guilty.

Second, the State of Nevada is now faced with the practical problem of trying to assemble a new trial fifteen years after the crime was committed. The prosecution, defense counsel and the trial judge make up the first line of defense established by our system for the protection of an accused's rights. Their failures in Standen's case were basic and

repeated. However, when the Nevada Supreme Court had the chance to correct the error in 1985, it applied the wrong test. There was substantial evidence to support the verdict. Unfortunately, this was not the question which was posed by Standen, but it was the one which that Court answered.

No one's interests, whether the public's or Standen's, have been served in this case. We can hope we have all learned from it.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WARREN ROBERT STANDEN, Case Number: CV-R-86-303-ECR

Petitioner, MAGISTRATE'S REPORT AND RECOMMENDATION

vs.

HAROL WHITLEY, et al.,

Respondents.

_____/

This report and recommendation is made to the Honorable Edward C. Reed, Jr., United States District Judge. The matter was referred to the U.S. Magistrate pursuant to 28 U.S.C. 636(b)(1)(B) and Local Rule 500-4(j). (Court docket #13).

Pro per petitioner Warren R. Standen has petitioned this court for a writ of habeas corpus pursuant to 28 U.S.C. 2254. (Court docket #9.) He is currently an inmate incarcerated in the custody of the State of Nevada Department of Prisons. Petitioner alleges he was denied

his rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Id. The respondents have filed an answer (court docket #5) and a supplemental answer (court docket #21).

Facts

On February 1, 1978, deputies of the Washoe County Sheriff's Office were dispatched to a location in Sparks on a report of an injured woman. The injured woman was the victim, Kaylyn Danner. She was dead, the cause being multiple stab wounds and her throat had been slit. Danner's vehicle was located about one-half hour after the original dispatch, some two or three miles away from where her body was found.

On February 4, 1978, a Sheriff's Department explorer located a trucker's log book in a ditch in the vicinity of where Danner's body was found. The log book contained petitioner's name.

Thereafter, an arrest warrant was issued for petitioner for the murder of Danner. He was apprehended on July 19, 1978, in New York. Extradition proceedings commenced and petitioner was returned to Reno in September of 1978.

Before trial, petitioner tried to implicate a former resident of a hospital for the criminally insane located in Rome, New York. The man petitioner sought to implicate had met petitioner at a school in Rome, but had not seen him since.

An autopsy of Danner provided evidence of fluid samples that matched petitioners blood type. Further head and body hair specimens from the crime scene were found to be consistent and similar to samples provided by petitioner.

Additional evidence showed that petitioner had been in Reno during the time the homicide occurred. He had registered at the Holiday Inn on Sixth

Street on January 24, 1978, and had used his own name. Further investigation revealed that petitioner had been in the casino where Danner was employed between the hours of 10:30 p.m. and 11:45 p.m. on January 31, 1978. Employees of the casino testified that petitioner was carrying some sort of dark-colored case in his hand, which was in physical appearance consistent with the log book found at the location of the body. Within one hour of being seen at the casino, petitioner was seen at the location were Danner's vehicle was found.

On November 2, 1978, [sic] petitioner was arraigned on the charge of murder in the first degree for the murder of Danner. To that charge, he plead [sic] not guilty. On February 13, 1979, petitioner changed his plea pursuant to negotiations, and plead [sic] guilty to first degree murder. He was subsequently

sentenced to life in prison without the possibility of parole.

After the entry of the judgment on the guilty plea, petitioner challenged the validity of that plea in a state post-conviction proceeding. His petition was denied and petitioner appealed the decision. On February 14, 1983, the Nevada Supreme Court found that petitioner's plea was constitutionally infirm, and remanded the case to the Second Judicial District Court for further proceedings.

On October 18, 1983, petitioner plead [sic] not guilty to an amended information charging him with murder with the use of a deadly weapon for the murder of Danner. A trial before a jury was conducted, and on August 15, 1984, the jury found petitioner guilty as charged. He was subsequently sentenced to life in prison without the possibility of parole for murder in the

first degree, and an additional consecutive term of life without the possibility of parole for the use of a deadly weapon. The sentences were ordered to run consecutively to the terms already being served for convictions of escape (during the original incarceration) and grand larceny while on escape status.

Thereafter, petitioner brought a direct appeal to the Nevada Supreme Court. The sole issue raised by petitioner on appeal was whether the district court prejudicially erred in instructing the jury that the prior guilty plea could be used as part of the evidence upon which a conviction could be based. On December 11, 1985, the Nevada Supreme Court found the instruction given by the judge to be erroneous; however, the court in affirming petitioner's conviction, concluded that the evidence against petitioner was substantial and therefore

the error was harmless beyond a reasonable doubt.

On October 2, 1986, petitioner filed a petition for post-conviction relief in Nevada State District Court. His petition raised the following issues:

> 1. Ineffective assistance of trial counsel for broaching the subject of the prior guilty plea and then continuing to ignore rulings from the court, culminating in the admission of the evidence and for failure to investigate possible exculpatory evidence disclosed by the State.
>
> 2. The district court prejudicially erred by instructing the jury in his murder trial that a prior guilty plea by petitioner could be used as part of the evidence upon which a conviction could be based.
>
> 3. Violation of his right to due process of law in that the State failed to disclose exculpatory evidence.
>
> 4. Ineffective assistance of appellate counsel for having failed to research law and facts concerning vindictive and retaliatory prosecution.
>
> 5. Vindictive and retaliatory prosecution after successful

appeal of a guilty plea by amendment of the criminal information to add the "use of a deadly weapon" enhancement of N.R.S. 193.165.

6. Cruel and unusual punishment, because of the application of N.R.S. 193.165, to a murder charge.

On May 9, 1988, the state district court denied Standen's petition. In its findings of fact and conclusions of law, the state district court addressed and denied the first three issues on the merits. The court mentioned the fourth issue, ineffective assistance of appellate counsel, but assumed it had been abandoned. No mention was made of the last two issues, vindictive prosecution and cruel and unusual punishment.

Thereafter, Standen appealed the denial of his petition to the Nevada Supreme Court. On August 25, 1988, the Supreme Court dismissed the appeal. In its order the Court addressed and dismissed the first three issues; however,

the Court did not directly address the last three issues but stated, "we have reviewed appellant's remaining contentions and conclude they are without merit."

Thereafter, Standen petitioned this court for a writ of habeas corpus alleging the six grounds for relief he raised in the state court proceedings.

Analysis

A. Exhaustion of State Remedies

Generally, a federal court will not entertain a state prisoner's petition for a writ of habeas corpus unless the petitioner has exhausted available state judicial remedies as required by 28 U.S.C. 2254. The exhaustion doctrine protects the state court's role in the enforcement of federal law and prevents disruption of state judicial proceedings. See Branden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490-91 (1973). Because "it would be unseemly in our dual

system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter." Rose v. Lundy, 455 U.S. 509 (1982) (citing Darr v. Burford, 339 U.S. 200, 204 (1950). Therefore, except in extraordinary circumstances, a federal district court must dismiss a petition that contains any claim as to which state remedies have not been exhausted. Id. Exhaustion cannot be obtained until the inmate petitioner first unsuccessfully presents his constitutional claims to the highest available state

court through direct appeal or state collateral review proceedings unless the state remedial procedures are unavailable or inadequate. Se Preiser v. Rodriquez, 411 U.S. 475, 490-94 (1973); Garrison v. McCarthy, 653 F.2d 374, 376 (9th Cir. 1981). Generally, however, a prisoner need exhaust only one avenue of relief in state court before bringing a habeas petition in federal court. This is true even where alternative avenues of reviewing constitutional issues are still available in state court. Hall v. Sumner, 682 F.2d 786, 788 (9th Cir. 1982); Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976).

In the instant case it is clear that as to the petitioner's first three contentions (ineffective assistance of trial counsel, instruction error, and failure to disclose exculpatory evidence) state remedies have been exhausted.

Petitioner has presented each of these claims to the highest available state court through his direct appeal and his appeal of his petition for post-conviction relief to the Nevada Supreme Court. The Nevada Supreme Court ruled explicitly on each of these contentions.

Turning to petitioners last three arguments (ineffective assistance of appellate counsel, vindictive prosecution, and cruel and unusual punishment), it is not as clear whether the exhaustion doctrine has been satisfied or whether the petitioner abandoned these issues at the state district court level. The state district court assumed that the petitioner's fourth contention, ineffective assistance of appellate counsel, had been abandoned and did not specifically address the last two contentions; however, the Court, in its conclusions, stated that it found that

"neither the law nor the facts support the allegations contained in petitioner's petition for post-conviction relief." The Nevada Supreme Court did not explicitly address any of these contentions, but after ruling on petitioner's first three contentions the court ruled that petitioner's remaining contentions were without merit.

This court finds that petitioner has exhausted his state remedies. The purpose of the exhaustion doctrine has been met in that the state courts have had an opportunity to address the constitutional violations alleged by petitioner. Petitioner presented each of his six contentions for relief to the state courts in his petition for post-conviction relief and direct appeal. Further, an evidentiary hearing was held by the state district court where petitioner had an opportunity to present evidence to support

his allegations, including the later three. Although the state courts did not explicitly rule on petitioner's last three issues, it appears the state courts, by the terms of their concluding statements, considered and rejected all of petitioner's claims.

Because it is determined that petitioner has exhausted his state remedies, this court will address the merits of each of his claims. Further, an additional evidentiary hearing is not required. Pursuant to 28 U.S.C. 2254, a federal court will presume the findings of fact by a state court are correct and complete unless the applicant establishes, the respondent admits or it otherwise appears that one of the circumstances enumerated in part (d) of that section is found to exist. See 28 U.S.C. 2254(d).

In the instant case an evidentiary hearing was held in State District Court

on March 11, 1988. At that time petitioner had a full and fair opportunity to present evidence concerning each of his grounds for relief. Because there is no indication that any of the circumstances in 28 U.S.C. 2254(d) exist, the findings of fact of the district court, filed May 10, 1988, are presumed correct.

B. The Merits

1. Vindictive Prosecution

Following petitioner's successful appeal of his guilty plea, the prosecutor sought and received permission to amend the information pending against petitioner to include a deadly weapon enhancement. Petitioner contends the deadly weapon enhancement to the original murder charge was retaliatory in nature and therefore unconstitutional.

There are two ways a petitioner can show vindictive prosecution. First, a defendant may produce evidence of actual

vindictiveness sufficient to show a due process violation. See United States v. Goodwin, 457 U.S. 368, 380 n. 12, 102 S.Ct. 2485, 2494 n. 12. Alternatively, a defendant may convince a court that the circumstances show there is sufficient "likelihood of vindictiveness" to warrant a presumption of vindictiveness. See Goodwin, Id. 457 U.S. at 376; Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 2102 (1974). If so, the prosecutor bears the burden of rebutting that presumption by showing objective reasons for the additional charge that were not present when the original charge was brought. Goodwin, 457 U.S. at 376 n. 8.

Here, petitioner has presented no evidence of actual vindictiveness; therefore, the focus of the analysis is on whether there exists a sufficient likelihood of vindictiveness to warrant the application of a presumption.

This United States Supreme Court has applied a presumption of vindictiveness in some circumstances. In North Carolina v. Pearce, 395 U.S. 711 (1969), an appellant received a longer sentence after a retrial than he had received after his first, constitutionally infirm, trial. Due to the likelihood that the higher sentence was an attempt to punish appellant for asserting his right to appeal, the Court held that a judge could not impose an enhanced sentence on retrial unless he specifically identified in the record his reasons for doing so. Those reasons "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. The Pearce court, in effect, applied a presumption of vindictiveness to the judge's action, a presumption rebuttable only by objective

information in the record. Goodwin, 457 U.S. at 374. The only other cases in which the Court applied a presumption of vindictiveness also involved retrials after a trial and conviction. Both Blackledge v. Perry, supra, and Thigpen v. Roberts, 468 U.S. 27, 104 S.Ct. 2916 (1984), were habeas actions brought by defendants who, after they asserted their statutory right to trial de novo following misdemeanor convictions, were charged with felonies arising out of the same facts that led to the misdemeanors.

The Court in Blackledge, in determining the likelihood of vindictiveness, looked not only on the right of the defendant, but also on the incentive of the prosecutor to prevent the defendant from asserting that right. The Court stated:

> A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial

> de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals - by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy - the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

Blackledge, 417 U.S. at 27-28.

In Bordenkircher v. Hayes, 434 U.S. 357, the Court for the first time considered an allegation of vindictiveness that arose in a pretrial setting. There the Court upheld the practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial. Id.

Thereafter, in United States v. Goodwin, supra, the Court upheld Bordenkircher and refused to extend Pearce

and Blackledge to pretrial enhancement of charges. The defendant in Goodwin was initially charged with several misdemeanors arising out of an encounter with a federal park officer. After some plea negotiations, the defendant refused to plead guilty, and indicated his desire for a jury trial. Thereafter, the United States Attorney's Office sought and obtained a felony indictment against Goodwin. Goodwin challenged his conviction on grounds of prosecutorial vindictiveness. Focusing largely upon the give and take of plea bargaining, and on the fluid state of information before trial, the Court upheld the conviction, refusing to extend the Pearce and Blackledge presumption of vindictiveness to the pretrial setting. See id. at 380-85. The Court pointed out that the prosecutor should remain free before trial to exercise the broad discretion entrusted

to him to determine the extent of the societal interest in prosecution and an initial decision should not freeze future conduct. Id. at 383.

Recently, the Court in Alabama v. Smith, 109 S.Ct. 2201 (1989) held that the Pearce presumption of vindictiveness does not apply when a sentence imposed after trial is greater than that imposed after a guilty plea.

Applying the above standards to the facts of the instant case it is clear that the deadly weapon enhancement to petitioner's murder charge after petitioner withdrew his guilty plea does not present the same "likelihood of vindictiveness" that the United States Supreme Court has found in the cases where a presumption was applied. Here, the prosecutor added the deadly weapon enhancement after petitioner withdrew his guilty plea; therefore, unlike the cases

where a presumption was applied, petitioner was still in the pre-trial phase of his prosecution. Although the Court has failed to find a presumption of vindictivenss in the pre-trial setting, a per se pre-trial/post-trial rule has not been adopted; therefore consideration of other factors is necessary.

In the instant case the prosecutor did not have the same incentive to prevent the petitioner from asserting his rights as the prosecutors did in Blackledge and Thigpen. In both of those cases the prosecutor has to re-try the defendant after full trials. Here, the prosecutor was faced with trying the petitioner for the first time after petitioner withdrew his guilty plea. Unlike the cases where a presumption was applied, no party is required to do over what it thought it had done correctly. The instant situation presents no more likelihood of

vindictiveness than that found in Bordenkircher where the defendant forced the prosecutor to go to trial by refusing to plead guilty. There, the Supreme Court refused to apply a presumption of vindictiveness.

Turning to the negotiations prior to petitioner's plea of guilty, petitioner was free to accept or reject the offer as was the defendant in Goodwin. Although the deadly weapon enhancement was not part of the original negotiations, the petitioner cannot say that he was not aware that the prosecutor would seek additional charges if the petitioner refused to plead guilty. The prosecutor placed petitioner on notice that the prosecution was going to seek the death penalty if the case went to trial, and petitioner initially accepted the bargain to avoid that possibility.

Finally, as in Bordenkircher,

Goodwin, and Smith, the petitioner in the instant case plead [sic] guilty before trial; consequently, the prosecutor may not have uncovered and assessed all the information against the accused. In the pre-trial situation the likelihood of improperly motivated charges is less than the situation where a prosecutor is preparing for trial. In preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he may come to realize that information possessed by the State has a broader significance. Thus, the timing of the prosecutor's action in this case suggest that a presumption of vindictiveness is not warranted.

2. Ineffective Assistance of Trial Counsel

During petitioner's 1984 jury trial for murder, evidence of his previously entered, but subsequently set aside,

guilty plea was admitted. Petitioner alleges this evidence was admitted, despite respondents' pretrial motion and the court's order to preclude its admission, because defense counsel repeatedly disregarded the Court's admonitions and broached the subject of the guilty plea with several of the State's witnesses. Petitioner contends that he was afforded ineffective assistance of counsel due to his attorney's conduct in broaching the subject of the guilty plea and then continuing to ignore the rulings from the court, culminating in the admission of the evidence.

In actuality the petitioner's trial counsel did not broach the fact of the guilty plea, but rather as a matter of deliberate strategy took advantage of the ruling and tried to leave the impression with the jury in questioning the State's

witnesses that they had negligently thrown away evidence or conducted a poor investigation and carelessly discarded potentially exculpatory evidence when in fact all work on the case stopped when Standen pleaded guilty. Despite several warnings by the trial judge that the tactic would result in admitting evidence of the guilty plea so the state could explain why evidence had been destroyed and no investigation had taken place in some years, counsel persisted. (See court docket #16, Exhibit FF - the Nevada Supreme Court's "Order Dismissing Appeal"). (See also transcript of evidentiary hearing, court docket #16, Exhibit CC, p. 40, at 2-8 where his trial counsel, Mr. Hotchin testified his questions were for a specific purpose.)

The Sixth Amendment right to counsel is the right to effective assistance of counsel. McMann v. Richardson, 397 U.S.

759, 771 n.14 (1970). The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Strickland v. Washington, 466 U.S. 668, 686 (1984). In order to show that his counsel's performance was so deficient as to require reversal of a conviction, a defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 687-91. However, a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; consequently, if it is found that there is a lack of sufficient prejudice, defendant's claim of

ineffectiveness of counsel will fail. Id. at 696-98.

In determining whether there is sufficient prejudice to warrant reversal, a court must consider the totality of the evidence before the jury and determine whether there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Id. at 619-96. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Applying these principals to the facts of the instant case it is clear that, even assuming the challenged conduct of counsel was unreasonable, petitioner suffered insufficient prejudice to warrant setting aside his murder conviction. A review of the evidence before the jury supports a conclusion that there is no reasonable probability that the result of

the proceeding would have been different if evidence of the prior guilty plea had not been entered.

Petitioner further alleges his counsel was ineffective by failing to conduct an adequate investigation which would have uncovered a letter containing alleged exculpatory evidence. In February, 1978, the Washoe County Sheriff's Department received an anonymous typewritten letter which stated in pertinent part that a "Ronald Mallory" had killed Danner. In the course of discovery, the district attorney turned over several exhibits, including this letter, to petitioner's former trial counsel. Petitioner's defense was subsequently assigned to another attorney, Lee Hotchkin, who first discovered the letter during trial.

Again, focusing on the effect the evidence would have had on the

petitioner's trial rather than his attorney's conduct, it is apparent petitioner did not suffer sufficient prejudice to require reversal of his conviction. At trial one of petitioner's defenses was that a man name Paul Santmyer (or St. Meyer) murdered Danner. His attorney testified at the evidentiary hearing that Mr. Standen told him he was an eyewitness to Santmyer's murder of Danner. The defense was based on this. (See court docket #16, Exhibit CC, pp. 40-43.) At no time did petitioner mention the involvement of any persons other than Santmyer. Further, petitioner has presented here no other evidence to support the contention that a person named Ronald Mallory was involved in the murder of Danner. In view of the overwhelming evidence of petitioner's guilt presented at trial, it is clear counsel's failure to investigate did not affect the outcome of

petitioner's trial.

3. Instruction Error by Trial Court

Petitioner contends the state district court prejudicially erred in instructing the jury that petitioner's prior guilty plea could be used as part of the evidence upon which a conviction could be based. At trial the judge advised the jury that they should base their decision on all the evidence in the case and that the guilty plea was part of that evidence.

Although the instruction the judge gave was erroneous because a prior guilty plea that has been legally withdrawn or judicially invalidated is deemed never to have existed and should not be used as evidence, (see Kercheval v. United States, 274 U.S. 220, 224 (1927), petitioner fails to allege that the court's error deprived him of a specific federal constitutional right. Therefore his claim fails. When a federal habeas petitioner merely

challenges the correctness of a state court's evidentiary ruling he alleges no deprivation of his federal constitutional rights, Gutierrez v. Griggs, 695 F.2d 1195 (9th Cir. 1983) and therefore he is not entitled to habeas relief. Further, even if petitioner's claim in construed as an allegation of a denial of due process, it would likewise fail. The constitution entitles a criminal defendant to a fair trial, not a perfect one. Delaware v. Von Arsdall, 106 S.Ct. 1431 (1986); E.g., United States v. Hasting, 461 U.S. 499, 508-09, 103 S.Ct. 1974, 1980 (1983); Burton v. United States, 391 U.S. 123, 135, 88 S.Ct. 1620, 1627 (1968). An otherwise valid conviction should not be set aside if the reviewing court finds that the constitutional error was harmless beyond a reasonable doubt. Delaware v. Von Arsdall, supra, at 1436. In light of the overwhelming evidence presented in

support of petitioner's guilt, it is clear that the trial court's error did not affect the outcome of petitioner's trial and was harmless beyond a reasonable doubt.

4. State's Failure to Disclose Exculpatory Evidence

Petitioner contends that he suffered a violation of his right to due process of law because the State failed to disclose alleged exculpatory evidence by allegedly failing to produce and deliver the anonymous letter implicating Ronald Mallory to trial counsel. This claim is without merit. Petitioner has presented no evidence to support this allegation. To the contrary the uncontroverted evidence is that the letter was delivered to defense counsel.

5. Remaining Claims

Petitioner's claim of ineffective assistance of appellate counsel for having failed to research law and facts

concerning the issue of vindictive prosecution is without merit. Appellate counsel has no duty to raise every non-frivolous claim which is recognized or which may be suggested by a client and the better tactical approach on an appeal is to winnow out weaker arguments and focus on key issues. Jones v. Barnes, 463 U.S. 745, 751-52, 754 (1983). Here, as discussed previously, petitioner's claim of vindictive prosecution is without merit.

Finally, petitioner argues that the deadly weapon sentence enhancement to his murder sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. This claim fails. A punishment is excessive and violative of the Eighth Amendment if it (1) makes no measurable contribution to acceptable goals of punishment, and hence is nothing

more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. Coker v. Georgia, 433 U.S. 584, 592 (1977). Here, the purpose of the deadly weapon enhancement is to deter the use of deadly weapons during the commission of crimes as well as to impose more severe punishment on those offenders who breach the weapon use statute. These are acceptable goals of punishment. Further, the United States Supreme Court has found that death is an appropriate punishment for the crime of first degree murder, (see Gregg v. Georgia, 428 U.S. 584, 592 (1977); therefore, it cannot be said that the imposition of two life sentences is grossly out of proportion to crime of murder in the first degree.

RECOMMENDATION

For the reasons stated above, it is the recommendation of the undersigned Magistrate that petitioner's writ of habeas corpus be denied.

DATED this 6th day of JUNE, 1990.

s/ Phyllis Halsey Atkins
UNITED STATES MAGISTRATE

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

WARREN ROBERT STANDEN, Case Number: CV-R-86-303-ECR

Petitioner, O R D E R

vs.

HAROL WHITLEY, et al.,

Respondents.

_____/

The court having reviewed the report and recommendation of the magistrate filed herein June 8, 1990, regarding petitioner's Petition for Writ of Habeas Corpus (December 9, 1988 - court docket #19) and objections having been filed thereto by petitioner on August 15, 1990, (court docket #38),

IT IS HEREBY ORDERED:

1. The objections of petitioner are overruled;

2. The magistrate's recommendation is hereby adopted;

3. Petitioner's Petition for Writ of Habeas Corpus (court docket #19) is denied.

4. The clerk is instructed to enter judgment accordingly.

DATED this 7th day of SEPTEMBER, 1990.

s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE SUPREME COURT

OF THE STATE OF NEVADA

WARREN ROBERT STANDEN,
Appellant,

vs.

THE STATE OF NEVADA,

Respondent.
_____/

No. 18974

Filed:
August 25, 1988

ORDER DISMISSING APPEAL

This is a proper person appeal from an order of the district court denying appellant's petition for post-conviction relief.

On January 31, 1978, Kaylyn Danner was brutally murdered. Appellant subsequently entered a plea of guilty to the murder of Danner. On February 14, 1983, this court reversed appellant's conviction for first degree murder on the ground that appellant's plea was not entered knowingly, voluntarily or with

understanding. See Standen v. State, 99 Nev. 76, 657 P.2d 1159 (1983).

The state subsequently filed an amended information charging appellant with murder with use of a deadly weapon. Prior to trial, defense counsel Lee Hotchkin filed a motion in limine to suppress evidence regarding appellant's former guilty plea or conviction. The district court granted the motion. During trial, defense counsel asked questions on cross examination implying that police investigators and crime laboratory technicians had dropped reasonable leads and carelessly discarded potentially exculpatory evidence. The prosecution objected on the ground that counsel was approaching a subject which had been closed by the order of the court granting appellant's motion in limine.[1] After

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1. The alleged exculpatory evidence had been discarded and the investigatory activities had ceased following entry of

defense counsel repeatedly disregarded the court's admonitions not to approach this subject, the trial judge allowed the prosecution to elicit testimony of the prior guilty plea to explain to the jury the reasons why all investigatory activities had ceased and why certain evidence had been discarded. At the conclusion of the trial, the jury returned a verdict of guilty. The district court sentenced appellant to life in prison without the possibility of parole for murder in the first degree, and a consecutive term of life without the possibility of parole for the use of a deadly weapon. This court affirmed appellant's conviction on direct appeal in Standen v. State, 101 Nev. 725, 710 P.2d

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appellant's guilty plea, in accordance with department policy. Consequently, to establish the reasonableness of the investigators' and technicians' actions, the prosecution was compelled to introduce evidence of the prior guilty plea.

718 (1985). On October 2, 1986, appellant filed a petition for post-conviction relief pursuant to NRS 177.315. The district court denied appellant's petition. This appeal followed.

Appellant first contended below that he was denied the effective assistance of counsel at trial. Under Strickland v. Washington, 466 U.S. 688 (1984), a criminal defendant who alleges ineffective assistance of counsel must show that counsel's performance fell below an objective standard of reasonableness and that, but for these unprofessional errors, the results of the proceedings would have been different. See also Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984), cert. denied, 471 U.S. 1004 (1985). If a defendant makes an insufficient showing of either component, his claim must fail. Strickland, 446 U.S. at 697.

Appellant cited two instances of

alleged counsel error. First, appellant contended that counsel was ineffective by repeatedly broaching the subject of appellant's prior guilty plea.[2] Appellant asserted that counsel's elicitation of this information violated NRS 48.125(1). This contention is without merit. On direct appeal from the judgment of conviction, appellant raised one issue: whether the district court prejudicially erred by instructing the jury that evidence of appellant's prior guilty plea could be considered in the jury's deliberations and relied upon to support a conviction. See Standen v. State, 101 Nev. at 727, 710 P.2d at 719. This court

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2. Appellant's allegation that defense counsel broached the subject of the prior guilty plea is incorrect, as noted above. Nevertheless, in Standen, 101 Nev. at 728, we recognized that "defense counsel effectively caused the revelation [of the prior guilty plea] through his persistent attempts to take improper advantage of the court's ruling in limine to exclude evidence of the guilty plea."

concluded that the trial judge's instruction was erroneous and a misstatement of the law. Nevertheless, we concluded the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of appellant's guilt. Id. In reaching this conclusion, this court implicitly recognized that defense counsel's questioning which necessitated the introduction of appellant's prior guilty plea was equally harmless. This holding constitutes the law of the case applicable to this appeal. See Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975). Accordingly, appellant is unable to demonstrate that counsel's alleged error prejudiced the outcome of his trial.

Appellant next contended below that counsel was ineffective by failing to conduct an adequate investigation which would have uncovered a letter containing

alleged exculpatory evidence. This contention, likewise, is without merit. In February 1978, the Washoe County Sheriff's Department received an anonymous typewritten letter which stated in pertinent part that a "Ronald Mallory" had killed Danner. In the course of discovery, the district attorney turned over several exhibits, including this letter, to appellant's former trial counsel. Appellant's defense was subsequently assigned to attorney Lee Hotchkin who first discovered this letter during trial. Although Hotchkin's failure to discover and investigate this letter raises concerns regarding the reasonableness of his investigation, appellant has failed to demonstrate that his defense was prejudiced by counsel's alleged error. In particular, we note that at trial appellant attempted to implicate a man name Paul Santmyer in the

murder of Danner. At no time did appellant mention the involvement of any persons other than Santmyer. Moreover, appellant did not present any affidavits or other evidence at the post-conviction hearing supporting the allegation that an individual named Ronald Mallory was involved in Danner's murder. Consequently, appellant failed affirmatively to demonstrate prejudice or an "actual adverse effect" on the outcome of his trial by counsel's failure to discover or investigate this letter. See Strickland, 466 U.S. at 693. In light of the overwhelming evidence of appellant's guilt, we conclude that counsel's error did not affect the outcome of the proceedings. Appellant's claim that he was denied the effective assistance of counsel, therefore, must fail.

Appellant next contended below that the district attorney violated NRS 174.245

and Brady v. Maryland, 373 U.S. 83 (1963), by failing to produce and deliver the anonymous letter to trial counsel.[3] We disagree. First, appellant did not raise this issue on direct appeal and has failed to demonstrate good cause or to offer any explanation for this failure. Consequently, appellant has waived this claim. See NRS 177.375(2); Scott v. Warden, 94 Nev. 726, 587 P.2d 36 (1978). Assuming, arguendo, that appellant has not waived this claim, appellant's contention is without merit. In particular, we note that the district attorney complied with appellant's general request for exculpatory material by making available to defense counsel its entire file. Accordingly, we conclude, under the facts

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3. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the court held that " the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment . . ."

of this case, that the district attorney did not violate NRS 174.245 or appellant's due process rights.

We have reviewed appellant's remaining contentions raised below and conclude that they are without merit. The district court therefore properly denied appellant's petition for post-conviction relief. Because appellant is unable to demonstrate error on appeal, we conclude that briefing and oral argument are not warranted. See Luckett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976). Accordingly, we hereby

ORDER this appeal dismissed.

s/ Gunderson, C.J.
Gunderson

s/ Steffen, J.
Steffen

s/ Young, J.
Young

s/ Springer, J.
Springer

s/ Mowbray, J.
Mowbray

APPENDIX E

Case NO. 86-4909

Dept. No. 6

IN THE SECOND JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WARREN ROBERT STANDEN,

Plaintiff,

vs.

HAROL WHITLEY, et al.,

Defendant.

/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 11, 1988, the above-entitled matter came before the Court for a hearing on the merits of Mr. Standen's Petition for Post-Conviction Relief. At the conclusion of the hearing, this Court denied the relief requested.

Mr. Standen, the Petitioner, argues that he was not afforded effective assistance of counsel as contemplated by the Sixth and Fourteenth Amendments to the

United States Constitution, and has cited two instances of attorney error to support that argument.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

In Strickland v. Washington, 466 U.S. 688 (1984), the United States Supreme Court held that convicted defendants, such as Mr. Standen, must make a twofold showing in order to demonstrate that counsel is ineffective. First, he must show that counsel's conduct was deficient, that is, unreasonable in light of prevailing professional norms; and secondly, that he was prejudiced, that is, but for counsel's errors there is a reasonable probability that the result of the proceeding would have been different.

1. THE GUILTY PLEA

During Petitioner's 1984 jury trial, evidence of his previously entered, but subsequently set aside, guilty plea was admitted. Mr. Standen had been

sentenced to life in prison without the possibility of parole. Ordinarily, the admission of such evidence is prohibited. See NRS 48.125. This evidence was admitted, despite a pretrial motion to preclude its admission, because defense counsel, Lee Hotchkin, "repeatedly disregarded the Court's admonitions and approached this subject" with several of the State's witnesses. See Standen v. State, 101 Nev. 725, 728 (1985).

According to Petitioner, he was afforded ineffective assistance of counsel due to Mr. Hotchkin's conduct in broaching the subject of the guilty plea and then continuing to ignore rulings from the Court, culminating in the admission of the evidence.

Mr. Hotchkin conduct was not inadvertent, but was a part of his defense strategy. He apparently believed that if the prior sentence of Mr. Standen was

disclosed to the jury, the jury would not vote to impose the death penalty. Although Mr. Hotchkin's conduct can be termed unprofessional and questionable ethically, that is not tantamount to a finding of ineffective assistance of counsel as a matter of constitutional law, and as noted above, Strickland, supra, requires proof of prejudice.

To find prejudice, the Court must conclude that there would be a reasonable probably [sic] that, absent Mr. Hotchkin's conduct, the fact finder would have had a reasonable doubt respecting guilt. Here, Petitioner was convicted by overwhelming evidence of guilt. Standen, supra, at 727. The Court concludes that Petitioner has not been prejudiced.

2. FAILURE TO INVESTIGATE

Next, Petitioner contends that counsel conducted a less than complete investigation of possible exculpatory

evidence disclosed by the State. This contention is also without merit.

In February of 1978, an anonymous typewritten letter was received by the Washoe County Sheriff's Department. In salient part, the letter stated that two other people, Ronald Mallory and Candy Dugan, had conspired to kill Mrs. Danner. The letter went on as follows:

> Ronald Mallory is Candy's friend, Patsy Cowen's old man. He has killed before but was not caught. He used a knife in those murders, too. He was driving a truck for Model Dairy. He is the man in the composite drawing you are looking for.

Pursuant to pretrial discovery, the defense received this letter, with many other items, on October 10, 1983, all of which were signed for by then Deputy Public Defender Scott Jordan.

Subsequently, Mr. Jordan left the Public Defender's Office, and Petitioner's defense was assigned to Steve Sexton and Lee Hotchkin. No evidence has been

presented regarding whether Mr. Jordan knew of this letter, or had investigated it. Mr. Hotchkin, however, stated he has received what Mr. Jordan signed for, which included the letter, but went on to say he had not seen the letter before the time it surfaced, which was during trial. In short, counsel did not know of the letter, and did not investigate it before or after it surfaced.

Counsel has an affirmative duty to conduct a reasonable investigation. Here, the investigation was less than complete, but that is not to say that counsel's conduct was unreasonable or his assistance ineffective.

A less than complete investigation can be reasonable. Strickland, supra. The extent to which an investigation is reasonable depends on whether reasonable professional judgment supports that conclusion.

Here, the central theme of defense was that another man, Paul Santmyer, committed the murder while Petitioner sat in or near a car, the headlights of which illuminated the area where the murder was committed. The information about Mr. Santmyer came from the Petitioner, and counsel acted on this information in an attempt to locate Mr. Santmyer, but they were unsuccessful. At no time did the Petitioner mention the involvement of anyone other than Mr. Santmyer.

In Strickland, supra, the court found that the reasonableness of counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions ... [and] ... what investigation decisions are reasonable depends critically on such information." Such is the case here. Counsel made a strategic decision based on

information supplied by, and insisted upon, by their client. According to his statements to his attorneys, he was the only living uninvolved eyewitness to the murder. Counsel was not ineffective for following this lead and presenting that line of defense.

B. ADDITIONAL CONTENTIONS

Petitioner has also alleged ineffective assistance of appellate counsel for having failed to argue certain issues on the direct appeal. No evidence was presented on this contention, and the Court assumes that it has been abandoned.

Finally, Petitioner argues that he suffered a violation of his right to due process of law under Brady v. Maryland, 373 U.S. 83 (1963), in that the State failed to disclose exculpatory evidence: namely, the anonymous letter referred to above. No evidence was presented to support this allegation in

the post-conviction proceeding, and the evidence presented during trial is to the contrary, i.e., that the letter was disclosed to the defense.

C. CONCLUSIONS

This Court finds that neither the law nor the facts support the allegations contained in Petitioners Petition for Post-Conviction Relief.

IT IS HEREBY ORDERED that the relief requested is denied.

DATED this 9th day of May, 1988.

s/ James Guinan
District Judge

APPENDIX F

WARREN ROBERT STANDEN, APPELLANT, v. THE STATE OF NEVADA, Respondent.

No. 16128

December 11, 1985 710 P.2d 718

Appeal from a judgment of murder with the use of a deadly weapon; Second Judicial District Court, Washoe County, James J. Guinan, Judge.

Defendant who pled guilty to first degree murder appealed from order of the district court denying post-conviction relief. The Supreme Court, 99 Nev. 76, 657 P.2d 1159, reversed and remanded for trial. On remand, jury found defendant guilty of first degree murder with a deadly weapon, and he again appealed. The Supreme Court, held that although trial judge erred in instructing jury that prior guilty plea which was reversed could be used as part of the evidence upon which a conviction could be based, error was

harmless, given overwhelming evidence of guilt.

Affirmed.

David G. Parraguirre, Public Defender, Mark L. Mausert, Deputy Public Defender, Daniel L. McCormick, Deputy Public Defender, Reno, for Appellant.

Brian McKay, Attorney General, Carson City; Mills Lane, District Attorney, Edwin T. Basl, Deputy District Attorney, Gary H. Hatlestad, Deputy District Attorney, Reno, for Respondent.

1. Criminal Law.

A prior guilty plea that has been legally withdrawn or judicially invalidated is deemed never to have existed and it should not be used as evidence.

2. Criminal Law.

Although trial judge erred in instructing jury that prior guilty plea which was reversed could be used as part of the evidence in murder trial, error was harmless beyond a reasonable doubt, given overwhelming evidence of guilt.

OPINION

Per Curiam:

A jury found Warren Robert Standen guilty of first degree murder with a deadly weapon and sentenced him to life without the possibility of parole. Since the murder was accomplished with the use of a deadly weapon, the penalty was enhanced and the district judge sentenced Standen to two consecutive terms of life without the possibility of parole. Standen challenges his conviction in this appeal. For the reasons set forth below, we affirm.

The Facts

On February 1, 1978, deputies of the Washoe County Sheriff's Officer were dispatched to a location in Sparks on a report of an injured woman. The injured woman was the victim, Kaylyn Danner. She was deceased. The cause of death was multiple stab wounds and her throat had

been slit. The victim's vehicle was located about one-half hour after the original dispatch, about two or three miles away from where the victim's body was found.

On February 4, 1978, a sheriff's department explorer located a trucker's log book in a ditch near where the victim's body was found. The log book contained appellant's name. After the log book was found, an arrest warrant was issued for Standen for the murder of Kaylyn Danner. He was apprehended on July f19, 1978, in New York. Extradition proceedings commenced and Standen was returned to Reno in September of 1978.

Before trial, Standen tried to implicate a former resident of a hospital for the criminally insane, in Rome, New York. The man Standen sought to implicate met Standen at the State School in Rome, but had not seen him since.

Evidence from the autopsy on the victim provided fluid samples that matched Standen's blood type. Further, head and body hair specimens from the crime scene were found to be consistent and similar to samples provided by Standen.

Additional evidence showed that Standen had been in Reno during the time the homicide occurred. He had registered at the Holiday Inn on Sixth Street on January 24, 1978 and had used his own name. Investigation revealed that Standen had been in the casino where the victim was employed between the hours of 10:30 p.m. and 11:45 p.m. on January 31, 1978. Employees of the casino testified that appellant was carrying some sort of a dark colored case in his hand, which was in physical appearance consistent with the log book found at the location of the body. Within one hour of being last seen at the casino, appellant was seen at the

location where the victim's vehicle was found.

On February 13, 1979 appellant entered a guilty plea to a charge of open murder. Subsequently, this Court reversed the conviction for first degree murder. Standen v. State, 99 Nev. 76, 657 P.2d 1159 (1983). We there held that Standen's plea was not entered knowingly or with understanding. Thereafter, an amended information was filed and Standen was charged with murder with the use of a deadly weapon. Standen pled not guilty to this charge and a date for trial was set.

Before trial, defense counsel moved to suppress the admission of evidence of Standen's prior guilty plea. The motion was granted and trial proceeded. During trial, the fact that appellant had previously pled guilty to the murder of Mrs. Danner came before the jury and the trial court briefly informed the jury of

the procedural history of the case. The court also formally instructed the jury on the subject of the prior guilty plea.

The jury found appellant guilty of first degree murder with the use of a deadly weapon. Standen was sentenced to two consecutive terms of life without the possibility of parole.

The Trial

The sole issue raised by Standen on appeal is whether the district court prejudicially erred in instructing the jury that the prior guilty plea could be used as part of the evidence upon which a conviction could be based.

We agree that the instruction given by the trial judge was erroneous and was a misstatement of the law. However, since the evidence of guilt was overwhelming, we conclude that the error was harmless beyond a reasonable doubt. See Harrington v. California, 395 U.S. 250 (1969).

At trial, the defense relied on a three prong attack. The first prong consisted of an attempt to implicate a man who could not otherwise be tied to the crime. The second prong consisted of an attempt to show that the crime required military precision which Standen could not have exercised due to a diminished mental capacity. The third prong consisted of an attempt to show dilatory conduct and incompetence on the part of the police and the crime laboratory.

The first prong failed. It was clear that the man implicated by Standen had not committed the crime. The second argument was equally unsuccessful. Although testimony was offered to show Standen's disminished [sic] mental capacity, the evidence supported the State's theory of the crime.

The success of defendant's final position depended not only on the actions

of the police investigators and the crime laboratory technicians, but also on the reasonableness and responsibility of those actions. Defense counsel tried to show improper conduct on the part of the police investigators and the technicians at the crime laboratory be inferring that reasonable leads had been dropped, potentially exculpatory evidence had been carelessly discarded, and the finger of blame had been pointed at Standen with little evidential support. Defense counsel knew that evidence of the prior guilty plea could not be admitted in order to explain the appearance of irresponsibility which defense counsel sought to create concerning the investigators and crime laboratory technicians. Finally, after defense counsel repeatedly disregarded the court's admonitions and approached this subject, the trial judge allowed the prosecution to

elicit testimony of the prior guilty plea in order to help the jury understand the reasons why all investigatory activities had ceased and the evidence had been disposed of in accordance with department policy. So, although the prosecutor initially exposed the jury to the prior guilty plea, defense counsel effectively caused the revelation through his persistent attempts to take improper advantage of the court's ruling in limine to exclude evidence of the guilty plea. [Headnote 1]

The trial judge then advised counsel that he would give a cautionary instruction at the end of the trial. Defense counsel asked that the instruction be given immediately. Without further preparation, the trial judge complied with defendant's request. The instruction the judge then gave was erroneous. The judge advised the jury that they should base

their decision on all the evidence in the case and that the guilty plea was a part of that evidence. This was error. A prior guilty plea that has been legally withdrawn or judicially invalidated is deemed never to have existed and should not be used as evidence. See Kercheval v. United States, 274 U.S. 220, 224 (1927). [Headnote 2]

We conclude, however, that the erroneous instruction was harmless beyond a reasonable doubt. Standen was in Reno at the time of the murder, his log book was found near the crime scene, and the physical evidence from the victim matched samples taken from him. Co-workers at the casino where the victim worked saw appellant shortly before the victim disappeared. Finally, Standen was seen where the victim's car was found, looking for his lost log book. Where there is substantial evidence in the record to

support the jury's verdict, this Court will not disturb the verdict on appeal. See Mercado v. State, 100 Nev. 535, 688 P.2d 305 (1984); Bolden v. State, 97 Nev. 71 624 P.2d 20 (1981).

Conclusion

Defendant's persistence in attempting to mislead the jury concerning the State's investigatory efforts and control invited the introduction of the prior guilty plea. The revelation of the prior plea was introduced to help the jury better understand the actions of the police and the crime lab technicians.

The initial instruction given by the trial judge was erroneous, but the evidence against Standen is substantial. The error is, therefore, harmless beyond a reasonable doubt. Therefore, the verdict of the trial court is affirmed.

93-451

No._____

Supreme Court, U.S.
FILED
OCT 19 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

HAROL WHITLEY, et al., Petitoner,

v.

WARREN ROBERT STANDEN, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANNY A. FORSMAN
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QUESTION PRESENTED

Whether the court of appeals properly concluded that the constitutional error at trial had a "substantial and injurious effect" on the verdict, given the overwhelming prejudice caused by the uninvited error in the admission at trial of evidence of the defendant's previous involuntary guilty plea to the charged offense and in light of its review of the record as a whole.

TABLE OF CONTENTS

	Page No:
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
III. ARGUMENT	5
A) INTRODUCTION	5
B) THE ERROR COMMITTED BY THE TRIAL JUDGE CANNOT BE EXCUSED UNDER THE DOCTRINE OF "INVITED ERROR"	7
C) THE NINTH CIRCUIT CONDUCTED A PROPER REVIEW OF THE RECORD BELOW AND THAT DECISION SHOULD NOT BE REVIEWED BY THIS COURT	11
CONCLUSION	14

TABLE OF AUTHORITIES

	Page No:
CASES	
Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)	1,5,7,10, 11,12,13,14
Jeffries v. Blodgett, ____F.3d ____, No. 91-36017, slip op. (9th Cir. Sept. 21, 1993)	13,14
Johnson v. United States, 318 U.S. 189 (1942)	8
McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993)	13,14
Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993)	1,3,6,7,8, 9,10,11,13
United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984)	8,9
United States v. Page, 661 F.2d 1080 (5th Cir. 1981)	9
United States v. Pina, 844 F.2d 1 (1st Cir. 1988)	9,10
RULES	
Federal Rules of Criminal Procedure 23(a)	9

I.

INTRODUCTION

The procedural record of this case, is generally described in the Petition for Writ of Certiorari. The Ninth Circuit Court of Appeals, in Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993), after a careful and thoughtful review of the record ordered that a writ of habeas corpus be granted because Standen did not receive a constitutionally fair trial. Standen was tried in the state of Nevada for first degree murder in July and August of 1984. The state sought the death penalty against Standen. However, after the penalty phase the jury sentenced him to two consecutive sentences of life without the possibility of parole. The constitutional error at trial consisted of the trial judge's decision to instruct Standen's jury that his prior involuntary plea of guilty to the murder could be used against him as substantive evidence of guilt. Adhering to the rule announced in Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), the Ninth Circuit characterized this mistake by the trial judge as an error of constitutional magnitude and held as follows:

> After a thorough review of the record we are convinced that the use of the guilty plea as evidence had substantial and injurious effect or influence in determining the jury's verdict. 994 F.2d 1426.

The decision of the Court of Appeals fairly portrays a summary of the evidence presented during Standen's prosecution. It also presents a cogent and lucid depiction of the events and procedural

circumstances leading up to the trial judge's erroneous decision to instruct the jury both during the trial and at the time of his final charge; that Standen's prior involuntary plea of guilty could be used as evidence to convict him for murder. Therefore, it is unnecessary to reiterate the factual and procedural history at length in this Brief in Opposition to Petition for Certiorari.

However, the petitioner, in its STATEMENT OF THE CASE has failed to present a complete rendition of the record. Because of this, a brief discussion of the facts is necessary in order for this Court to fully understand the basis for the lower court's decision.

Finally, the petitioner seeks relief from this Court and cites two reasons justifying their request. Standen respectfully submits that neither reason warrants or compels a review of the decision below.

II.

STATEMENT OF THE CASE

The recitation of the facts set out in the petition contains several incomplete characterizations of the record below. It would be unnecessarily repetitive to review the entire trial by way of summary herein. Therefore, the following review of certain portions of the record should serve only as a rebuttal to the petitioner's version of the record below.

To begin with, the petitioner incorrectly states that, "Fingerprints were also present, but were of insufficient quality to allow for comparisons." Petition (Pet.) at 5. In fact, on July

18, 1984, state witness John T. Westwood, a fingerprint expert, testified that he lifted 20 latent fingerprints from the victim's car. R. Volume (V.) II, Trial date (t.d.) July 16, 1984 at 129-195. He testified that he was not able to identify the remaining prints as belonging to Standen. Id. Moreover, this same witness testified that he lifted twelve other latent prints from evidence not found in the car and that those fingerprints did not belong to Standen. Id. Westwood's testimony was corroborated by witness Jeffrey Wise. R.V.XII, t.d. August 2, 1984 at 111-114.

The next incomplete factual assertion deals with the petitioner's contention that semen found during the victim's autopsy indicated that "Standen could have been the donor." Pet. at 5&6. The petitioner neglects to apprise this Court that the trial testimony of Enrico Tognieri, indicated that the semen was attributable to a Type A secretor and that although Standen was a Type A secretor so were 32% of the entire male population. R.V. VIII, t.d. July 27, 1984 at 122. This fact was not lost on the court of appeals. 994 F.2d at 1420.

The petitioner also asserts that pubic and head hair found at the crime scene and in the car were consistent with Standen's. Pet. at 6. The witness that provided this testimony for the state was David Atkinson, an employee of the County Criminalistic Lab. R.V. VII, t.d. July 26, 1984 at 62-115 and R.V. VII, t.d. July 27, 1984 at 2-37. He testified that there were no tests available to allow a scientist to determine that a particular hair came from a

particular person. On cross-examination he admitted that he had very little training in hair comparison and that he usually ends his reports with a disclaimer indicating that hairs do not possess adequate characteristics to do a valid comparison. R.Id. He admitted that he was not sure if the hair found in the car (head hair) or the public hair was Standen's. Id. He could not even be sure as to what race the owner of the hair belonged to. R.Id. He conceded that this type of analysis was highly subjective. Finally, he testified that other hairs, not belonging to Standen were found in the car. Id.

The petitioner observed that when Standen was arrested he had, in his personal effects, "a buck knife which a forensic pathologist suggested could have been the murder weapon." Pet. at 8. What the petitioner does not explain is that the knife was not in any way, forensic or otherwise, linked to Danner's murder. Moreover, the petitioner neglected to advise this Court that a pair of scissors was found in Danner's car (R.V.II,t.d. July 16, 1984 at 177) which, according to a state witness, could have been the murder weapon. R.V.III,t.d. July 18, 1984 at 283. However, no evidence was presented, forensic or otherwise, linking Standen to the scissors.

It is important to note that Standen's trial attorney attempted to dismiss the prosecution prior to trial based on the state's failure to preserve the semen swabs collected during Danner's autopsy. R.V.II,t.d. July 16, 1984 at 5. It was conceded by the state, the prior prosecutor (who testified at a hearing outside the

presence of the jury regarding this issue) (R.V.II,t.d. July 18, 1984 at 67), and the trial judge (R.V.VIII,t.d. July 27, 1984 at 14); that the semen evidence was consumed by testing prior to Standen's original plea of guilty. Therefore, any cross-examination on this issue could not have possibly been intended as an attempt to invite error because the issue of the exhaustion of the semen sample had nothing to do with Standen's earlier plea of guilty.

Finally, although the following is accurately described in the opinion below, because it was overlooked by the petitioner in its statement of facts, Standen believes it bears mentioning again. The trial judge instructed the jury both during the trial as well as in the body of instructions that Standen's prior guilty plea could be used as evidence of guilt against him. Standen's jury was instructed in this manner, by the trial judge, on no less than three occasions.

III.

ARGUMENT

A) INTRODUCTION

The Ninth Circuit Court of Appeals was the first court to conduct the type of review compelled by Brecht. The court conducted "a de novo examination of the trial record" in order to ensure "that 'the error did not influence the jury' . . . and that 'the judgment was not substantially swayed by the error.'" 113 S.Ct. 1723, 1724 (Stevens, J., concurring), citations omitted. Their review led them to an abiding conclusion that Standen did not receive a fair trial.

The petitioner contends that this conclusion is in conflict with that of four other courts that previously reviewed the record. This proposition is without legitimacy because each of those courts (state trial judge, Nevada Supreme Court, federal magistrate-judge, and federal district judge) conducted the wrong type of review. This error is succinctly observed in the concurring opinion of Judge Nelson in the decision below. He observed that although his review of the record led him to conclude that Standen was guilty, he conceded that it was the jury's province to reach that result. 994 F.2d 1426, (Nelson, J., concurring). Therefore, because "its verdict was tainted by a trial error unique in the history of the common law . . ." Judge Nelson agreed that Standen deserved a new trial. Secondly, Judge Nelson pointed out that the reason this wrong took so long to be righted rested with each previous court's inability to apply the correct standard of review. He stated as follows:

> Second, the State of Nevada is now faced with the practical problem of trying to assemble a new trial fifteen years after the crime was committed. The prosecution, defense counsel and the trial judge make up the first line of defense established by our system for the protection of an accused's rights. Their failures in Standen's case were basic and repeated. However, when the Nevada Supreme Court had the chance to correct the error in 1985, it applied the wrong test. There was substantial evidence to support the verdict. Unfortunately, this was not the question which was posed by Standen, but it was the one which that Court answered. Id.

Unfortunately, the federal courts of Nevada conducted the same

type of sufficiency of the evidence review of the record and concluded that Standen received a fair trial.

The Ninth Circuit was the only court to follow the rule in Brecht and correctly concluded that the constitutional error in this case compelled a new trial.

The petitioner identifies two reasons in support of its request for certiorari. Neither contention has merit.

B) THE ERROR COMMITTED BY THE TRIAL JUDGE CANNOT BE EXCUSED UNDER THE DOCTRINE OF "INVITED ERROR"

The first reason submitted by the petitioner is its belief that the opinion below stands for the proposition that error invited by the accused cannot be later used as a reason for relief from a criminal conviction. This argument was raised by the petitioner below and summarily dealt with in Judge Noonan's opinion. Writing for the majority he held as follows:

> That the tactics of Standen's counsel had provoked the trial court into allowing the plea in evidence, that the court's error can thus be catalogued as invited, does not mitigate what was done. The defendant is bound by his counsel's strategic decisions. United States v. Martinez, 883 F.2d 750, 755 (9th Cir. 1989), **vacated on other grounds** 928 F.2d 1470 (9th Cir. 1991). But counsel's strategy cannot be held to have acted as a waiver of Standen's right to a fair trial by jury, **cf.**, Carnley v. Cochran, 369 U.S. 506, 516 (1962); and the state does not contend that it does. Id. at 1422.

The petitioner suggests that the opinion below is "in conflict with other circuits respecting invited error." Pet. at 16. A review of each of the cases cited for this proposition reveals the

transparency of the argument.

Johnson v. United States, 318 U.S. 189 (1942) is not on point with this case. The Johnson case dealt with a situation wherein a defendant testified at his tax evasion trial. During his testimony he asserted his Fifth Amendment privilege and the trial judge permitted him to refrain from testifying. 318 U.S. at 191-193. During his summation the prosecutor committed trial error when he commented on the defendant's refusal to testify. Id. However, defense counsel "expressly waived any objection to the prosecutor's comments by withdrawing his exception to it and by acquiescing in the treatment of the matter by the court." Id. The court held that an express waiver of a trial error precluded review of that error on appeal. The Johnson decision has no similarity to the facts in Standen's case. It did not present the type of constitutional error that is the subject of this case. The rule in Johnson does not stand for a lawyer's ability to waive his client's right "to a fair trial by jury." Standen, 994 F.2d at 1422.

In United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984), (citations omitted), the Eleventh Circuit held that:

> If the defendant admits, or the government plainly demonstrates, that at the time of the waiver the defendant was not ignorant of his jury right and consented to the waiver, reversal would not be in order, for the defendant cannot complain on appeal of an alleged error invited or induced by himself.

In Garrett, the record was silent on this issue and the court remanded the case back to the trial court for an evidentiary

hearing. Id. at 1013. Garrett has no application to this case.

Garrett does not provide authority for the proposition that an attorney can waive his client's right to a fair and impartial jury trial. The Ninth Circuit's decision in the case below properly identified this rule and properly dismissed any argument of waiver or invited error. 994 F.2d. at 1422.

In United States v. Page, 661 F.2d 1080, 1082 (5th Cir. 1981) the defendant, a person holding a doctoral degree and formerly employed as a professor of biology, was accused of fraud. His only claim on appeal was that he did not waive, in writing, his right to a jury trial pursuant to Fed.R.Crim.P. 23(a). The Fifth Circuit held that, under the facts of the case, it was obvious that the accused actively participated in the decision to proceed without a jury and that the decision was tactical. Id. at 1082-1083.

The same cannot be said to have occurred in Standen's case. Standen possessed an IQ of 65 and was practically retarded. The record below does not even hint at the possibility that Standen participated in some plan to create error at trial in order to profit from it on appeal or collateral review. The Page case is inapposite to the error that was committed below.

Finally, United States v. Pina, 844 F.2d 1, 8 (1st Cir. 1988), is a case in which the accused, himself at trial, opened the door to other crimes evidence. 844 F.2d at 8. On appeal, the First Circuit held that the accused was foreclosed from complaining about this evidentiary ruling because he initiated the line of questioning

causing it to become relevant. Id. Pina is not a case in which the trial error rose to constitutional magnitude. Brecht, 113 S.Ct. at 1722. It is not a case wherein a trial judge advised a jury that a prior involuntary plea of guilty could be used as evidence of guilt in the subsequent trial. It has no application to this case.

The petitioner obliquely contends that Standen's trial attorney was motivated by strategy or tactics to lure the trial judge into committing the egregious constitutional error that formed the basis for relief below. However, when Standen's attorney testified at Standen's state habeas corpus evidentiary hearing, he denied that he intended to invite such error through any strategic or tactical designs. R. Evidentiary Hearing, March 18, 1988 at 4-46.

The mistake that was made by the trial judge cannot be rationalized or forgiven by blaming Standen's lawyer. When faced with having to resolve the evidentiary issue presented to him by two adversaries fighting to win a murder trial the judge selected a remedy that would serve to debilitate Standen's ability to obtain a fair jury trial and essentially guarantee a conviction for the state. There were a myriad of less harsh solutions that were either not considered or completely rejected. This case is unique in the annals of criminal law. No case compares to the error committed by the trial judge. The Ninth Circuit said it best when it began the legal analysis for the decision below as follows:

> If no such case exists, it is because it contradicts the character of a trial to ask a jury to consider a defendant's guilt in terms

> of specific testimony and also in terms of his own plea of guilty. . . .A fair trial cannot be had if a jury must weigh with all the other evidence, pro and con, the one overwhelming piece of evidence: the defendant pleaded guilty. 994 F.2d at 1422.

C) THE NINTH CIRCUIT CONDUCTED A PROPER REVIEW OF THE RECORD BELOW AND THAT DECISION SHOULD NOT BE REVIEWED BY THIS COURT

The second reason the petitioner presents for a grant of certiorari consists of a complaint to this Court that the Ninth Circuit did not properly apply the Brecht standard to the case below. This assertion is yet another attempt by the state of Nevada to legitimize Standen's conviction by arguing that the evidence of guilt, separate and apart of the constitutional error, was overwhelming. The state of Nevada, once again, misapprehends the very essence of the Brecht decision which is well-stated in Justice Stevens' concurring opinion. Justice Stevens, providing the fifth vote for the majority, carefully qualified what he perceived to be the duty of the reviewing court in a case such as this. He wrote as follows:

> The purpose of reviewing the entire record is, of course, to consider all the ways that error can infect the course of a trial. Although THE CHIEF JUSTICE properly quotes the phrase applied to the errors in Kotteakos (" 'substantial and injurious effect or influence in determining the jury's verdict' "), ante, at 1714, 1716, 1722, we would misread Kotteakos itself if we endorsed only a single-minded focus on how the error may (or may not) have affected the jury's verdict. The habeas court cannot ask only whether it thinks the petitioner would have been convicted even if the constitutional error had not taken place.

Kotteakos is full of warnings to avoid that result. It requires a reviewing court to decide that "the error did not influence the jury," id., at 764, 66 S.Ct., at 1248, and that "the judgment was not substantially swayed by the error," id., at 765, 66 S.Ct., at 1248. In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is not "were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge other's reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." Id., at 764, 66 S.Ct., at 1248 (citations omitted).

The Kotteakos standard that will now apply on collateral review is less stringent than the Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), standard applied on direct review. Given the critical importance of the faculty of judgment in administering either standard, however, that difference is less significant than it might seem--a point well illustrated by the differing opinions expressed by THE CHIEF JUSTICE and by Justice KENNEDY in Arizona v. Fulminante, 499 U.S. ____, ____, ____, 111 S.Ct. 1246, ____, ____, 113 L.Ed.2d 302 (1991). While THE CHIEF JUSTICE considered the admission of the defendant's confession harmless error under Chapman, see 499 U.S., at ____ _ ____, 111 S.Ct., at 1255 (dissenting opinion), Justice KENNEDY's cogent analysis demonstrated that the error could not reasonably have been viewed as harmless under a standard even more relaxed than the one we announce today. See id., at

> ____ _ ____, 111 S.Ct., at 1266-1267 (opinion concurring in judgment). In the end, the way we phrase the governing standard is far less importar han the quality of the judgment with which i. .s applied. Id. at 1724-1725, (Stevens, J., concurring opinion).

This rule was not lost on Judge Nelson when he wrote, in his concurring opinion, that although the evidence was certainly sufficient to convict, the error could never be cured. 994 F.2d at 1426. The only remedy, in his opinion, was a new trial. Id. Justice Stevens' analysis has been approved and adopted by the Ninth Circuit. See, McKinney v. Rees, 993 F.2d 1378 (9th Cir. 1993). In McKinney, a case cited by the petitioner (Pet. at 22) the Ninth Circuit made the following observation:

> Like Justice Stevens, we review the trial transcript to determine *not* whether the jurors were right in their judgment, regardless of the error or its effect upon the verdict. [But] rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. . . . This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. Id. at 1385-1386, [citations omitted].

In Jeffries v. Blodgett, ____F.3d ____, No. 91-36017, slip op. at 10284 (9th Cir. Sept. 21, 1993) the Ninth Circuit had another opportunity to apply the Brecht test for constitutional error. In that case the issue was juror misconduct. Specifically, the court was faced with whether or not a writ should issue because of allegations by the accused that his trial jurors were wrongfully

advised by a fellow juror that he had a criminal record. The court in Jeffries applied the proper de novo review and emphasized the following language from the Kotteakos decision.

> The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. Id.

The Jeffries court concluded that a remand back to the district court for an evidentiary hearing on this issue was warranted.

The petitioner latches onto language in McKinney regarding the "weighty" nature of the evidence against the accused yet never discusses how the evidence in this case overcomes the magnitude of the constitutional error committed by the trial judge. The state of Nevada is only interested in the end result; a conviction. The state of Nevada does not bother to make a legal argument justifying the unconstitutional means used to achieve that end result. The fact that the state of Nevada does not present a cogent legal argument for certiorari makes it impossible for Standen to form a legal response other than to direct this Court to the opinion below. The Ninth Circuit was the first and only court to conduct the review mandated by Brecht. There has been no compelling reason presented by the state of Nevada to disturb that decision. Therefore, it should be the last court to review this record.

CONCLUSION

Warren Standen has been in the Nevada state prison system for

approximately fifteen years. He appealed a murder conviction that was based upon an unconstitutional jury trial. He presented this issue in proper fashion to both the state and federal courts of Nevada. He did not have an attorney to assist him on his federal habeas petition and was not provided counsel until the Ninth Circuit appointed counsel to represent him on appeal of the denial of his request for a writ of habeas corpus.

Standen's efforts to obtain justice were stymied until the Ninth Circuit properly conducted the review mandated by this Court. Prior to that every other court validated his conviction after failing to apply the proper appellate or collateral standard of review. Now the state of Nevada seeks relief from a decision that is correct. The state of Nevada offers no new or compelling reason for this request. Instead it complains that because four other courts took a different approach and reached the same conclusion the Ninth Circuit's decision must be wrong. This reasoning has no legal or factual basis. It must be disregarded and rejected.

For the reasons stated in this Brief in Opposition to Petition for Writ of Certiorari, Standen would respectfully ask this Court to deny the relief sought by the state of Nevada.

Respectfully submitted,

JOHN C. LAMBROSE, Chief
Assistant Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

HAROL WHITLEY, et al., Petitioner

v.

WARREN ROBERT STANDEN, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she is an employee in the office of the Federal Public Defender for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on October 19, 1993, he/she served a copy of the above and foregoing document by mailing a copy of the said document in a postage paid envelope addressed to:

District Attorney
Washoe County
Gary H. Hatlestad
Deputy District Attorney
75 Court Street, Suite 214
Reno, Nevada 89501

Pamela M. Ramage

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